

completed at 12:23am and 12:30am. At 12:55am Trooper Kauffman read the defendant the independent test advisory and the defendant acknowledged she understood and signed the form. The defendant was then advised of her charges and booked into Maricopa County jail.

II. LAW AND ARGUMENT

The right to a fair chance to gather exculpatory evidence includes reasonable access to counsel. *State v. Transon*, 186 Ariz. 482, 485, 924 P.2d 486, 489 (Ct. App. 1996). In addition, a defendant has a due process right to secure an independent chemical test for DUI cases. *Montano v. Superior Court*, 149 Ariz. 385, 719 P.2d 271 (1986). The State may not 1) unreasonably interfere 2) with a defendant's reasonable efforts to gain the exculpatory evidence. *Smith v. Cada*, 114 Ariz. 510, 562 P.2d 390 (App. 1977); *Smith v. Ganske*, 114 Ariz. 515, 556 P.2d 395 (App. 1977).

A. THE STATE DID NOT UNREASONABLY INTERFERE WITH DEFENDANT'S ACCESS TO COUNSEL BECAUSE THE STATE PROVIDED A REASONABLE TIME FOR THE DEFENDANT TO SPEAK WITH COUNSEL BEFORE POLICE EXECUTED A VALID WARRANT TO COLLECT DISSIPATING EVIDENCE IN A TIMELY MANNER.

Generally, "(L)aw enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand". *McNutt v. Superior Ct. of State of Ariz., In & For Maricopa Cty.*, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982). When police refuse a DUI suspect's right to counsel, the State has the

burden of proving that allowing the suspect to confer with counsel when requested would have impeded the investigation. *State v. Rumsey*, 225 Ariz. 374, 377, ¶ 8, 238 P.3d 642, 645 (App.2010). In every DUI investigation in which blood alcohol evidence is sought, time is considered of the essence and a factor courts can consider when evaluating possible deprivation of rights during a DUI investigation. *Id.* at 378.

In *Rumsey*, the right to counsel was not violated when the defendant had the chance to speak on the phone for six minutes at the scene of the accident with their attorney. *Id.* at 377. However, the court later found a violation of the right to counsel when the police denied the defendant access to counsel while waiting for a search warrant even though the defendant had already consented to a blood draw. *Id.* Thus, there were no exigent circumstances (urgency) or a valid reason for the police to interfere with the defendant's right to counsel. *Id.*

Similar to *Rumsey*, the defendant here had the opportunity to speak with her counsel on the phone after she was removed to a safe location away from the scene of the accident. The officer asked her to hang up the phone call after some time to complete Field Sobriety Tests to determine if he had probable cause to arrest her. Trooper Kauffman behaved similar to the officer in *Rumsey*, where the court determined there was no deprivation of the right to counsel at that initial point in the investigation.

Later, at the station, the defendant here had the opportunity to speak with her attorney again for 15 minutes before police asked her to end the call. This case can be distinguished from *Rumsey* because the defendant here did not consent to a blood draw or any tests and police had to get a search warrant unlike the defendant in *Rumsey* who

consented to a blood draw so there was no need for a warrant or any delays. When Trooper Kauffman finally received the warrant in this case, the defendant changed her mind and agreed to a breath test (Intoxilyzer). By the time the breath tests were completed at 12:23am and 12:30am it had already been slightly over two hours since the time of the initial stop (10:15pm) which is a critical point in most DUI investigations. *State v. Stanley*, 217 Ariz. 253, 258, 172 P.3d 848, 853 (Ct. App. 2007). Between the two phone calls with counsel and the delay in obtaining a warrant the defendant had already added time to the investigation, but police behaved reasonably and accommodated her requests and respected her rights.

Therefore, time was of the essence in this case and the defendant had already been afforded two opportunities to speak with her attorney. The police in this case behaved reasonably and allowing the defendant potentially unlimited time to speak with counsel before the initial investigation was complete would have unreasonably impeded the investigation and put critical evidence at further risk of destruction.

B. THE STATE DID NOT UNREASONABLY INTERFERE WITH DEFENDANT’S EFFORTS TO GAIN INDEPENDENT EXCULPATORY EVIDENCE BECAUSE THE DEFENDANT MADE NO REASONABLE EFFORTS.

A defendant must only be given a *reasonable opportunity* to obtain potentially exculpatory evidence. *Van Herreweghe v. Burke*, 201 Ariz. 387, 389, 36 P.3d 65 (App. 2001). A due process violation only occurs when a defendant makes a reasonable effort to obtain an independent chemical test but is unreasonably frustrated by the State (police officers and jail personnel). *See State v. Mahoney (DeRoos, Real Party in Interest)*,

25 Ariz.App. 217, 542 P.2d 410 (1975) (defendant was not denied reasonable efforts where he only requested release and not did make any reasonable efforts to obtain exculpatory evidence).

Here, the defendant asked to be released from custody to complete independent testing like the defendant in *Mahoney* and similarly took no further reasonable efforts. The defendant spoke twice with her attorney and acknowledged that she understood and signed the independent advisory test form, which explained her right to seek independent testing. Even though the defendant was held in the Maricopa County Jail after the initial investigation was completed this alone is not enough to constitute unreasonable interference as *Mahoney* established. The Maricopa County Jail has procedures and policies in place establishing how defendants can request independent testing while in custody. See Exhibit A (Maricopa County Sheriff's Office Policy GJ-29, *Independent Testing Procedures for DUI and OUI Arrests*). Yet, the defendant does not allege that she made any reasonable efforts to gain independent exculpatory evidence while in custody.

Therefore, the state did not unreasonably interfere with the defendant's right to gain exculpatory evidence because the defendant did not allege any reasonable efforts that were frustrated by the state.

III. Conclusion

For the foregoing reasons, the State requests that the Court deny Defendants Motion to Dismiss Re: Right to Counsel.

Applicant Details

First Name	William
Middle Initial	J
Last Name	Golden
Citizenship Status	U. S. Citizen
Email Address	wgolden2@nd.edu
Address	<div style="border: 1px solid black; padding: 5px;"> Address Street 305 Widewater Drive City Newnan State/Territory Georgia Zip 30265 Country United States </div>
Contact Phone Number	6785525118

Applicant Education

BA/BS From	University of Georgia
Date of BA/BS	May 2021
JD/LLB From	Notre Dame Law School
	http://law.nd.edu
Date of JD/LLB	May 17, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Journal of Legislation
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Swayze, Reid
Reid.P.Swayze@dea.gov
(213) 923-0805
Garnett, Richard W.
rgarnett@nd.edu
574-631-6981
Gurule, Jimmy
Jimmy.Gurule.1@nd.edu
574-631-5917

References

Prof. Jimmy Gurulé, Jimmy.Gurule.1@nd.edu, (574) 631-5917; Prof.
Richard W. Garnett, rgarnett@nd.edu, (574) 631-8078; Mr. Reid
Swayze, Reid.P.Swayze@dea.gov, (213) 923-0805

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

54721 Burdette Street
Apt. 2-2110
South Bend, IN 46637
wgolden2@nd.edu
(678) 552-5118

July 23, 2023

The Honorable James O. Browning
United States District Court for the District of New Mexico
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am a rising third-year law student at Notre Dame Law School. I am writing to apply for a clerkship in your chambers beginning in 2024.

Enclosed please find my resume, law school and undergraduate transcripts, and writing samples. You will receive letters of recommendation from the following people. In the meantime, they would be welcome to discuss my candidacy with you.

Prof. Jimmy Gurulé
Notre Dame Law School
Jimmy.Gurule.1@nd.edu
(574) 631-5917

Prof. Richard W. Garnett
Notre Dame Law School
rgarnett@nd.edu
(574) 631-8078

Mr. Reid Swayze
Drug Enforcement Administration
Reid.P.Swayze@dea.gov
(213) 923-0805

If I can provide additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

William J. Golden

305 Widewater Drive
Newnan, GA 30265

William J. Golden
(678) 552-5118 • wgolden2@nd.edu

54721 Burdette Street, Apt. 2-2110
South Bend, IN 46637

EDUCATION

University of Notre Dame Law School

Juris Doctor Candidate

GPA: 3.521

Notre Dame, Indiana

May 2024

- Honors: Best Brief Award for Excellence in Persuasive Writing (Appellate)
- Activities: Notre Dame *Journal of Legislation*, Executive Legislative Editor; Notre Dame Exoneration Justice Clinic; Public Interest Leadership Council, Co-Chair Emeritus; Future Prosecuting Attorneys Council, President Emeritus; Federalist Society, Member; Honor Council Prosecutor

University of Georgia

Bachelor of Arts in Political Science and Economics, magna cum laude, with Minor in Criminal Justice Studies

GPA: 3.86

Athens, Georgia

May 2021

- Honors: Dean's List, 4 semesters
- Activities: Georgia Political Review, Business Manager (2020 – 2021), Staff Writer (2019 – 2021); Outreach Director, Tripp for State Senate; Federal Work Study Student, Map and Government Information Library

EXPERIENCE

United States Attorney's Office for the District of Columbia

Legal Intern

Washington, D.C.

June 2023 – August 2023

- Drafted pleadings advancing Fourth and Fifth Amendment claims and internal memoranda interpreting the statutory requirements of several D.C. crimes, including trafficking in stolen property, illegal possession of a firearm, and possession of an instrument of crime
- Assisted Assistant U.S. Attorneys with trial preparation by participating in witness conferences, reviewing body worn camera footage, examining trial transcripts, and creating exhibit binders
- Attended judicial proceedings, including trials, arraignments, status hearings, and sentencings

Drug Enforcement Administration, Office of Chief Counsel

Legal Intern

Arlington, Virginia

May 2022 – August 2022

- Researched and analyzed novel legal issues including Canadian privacy law, Second Amendment sanctuary proposals, and searches of abandoned drones
- Drafted internal and external memoranda, pleadings, and legal correspondence for International and Intelligence, Diversion, Division Counsel, Criminal, Administrative, and Litigation Divisions
- Participated in training exercises for law enforcement officers, client meetings, and interagency deliberations

Myrtle Beach Area Chamber of Commerce

Government Affairs Intern

Myrtle Beach, South Carolina

May 2021 – August 2021

- Re-established recruiting efforts for National I-73/74/75 Corridor Association, generating more than 40 relationships with invested parties along federally designated I-73/74/75 Corridor
- Created policy proposals, advocacy materials, and research memoranda to advocate for Myrtle Beach area business community and National I-73/74/75 Corridor Association
- Conducted briefings for business leaders and elected officials on the status of Myrtle Beach Area Chamber of Commerce's legislative priorities and progress of the National I-73/74/75 Corridor Association's partnership recruitment

Georgia Chamber of Commerce

Public Affairs Legislative Aide

Atlanta, Georgia

January 2021 – May 2021

- Organized Government Affairs Council (GAC) meetings for member lobbyists by updating legislative bill tracker, crafting amendments, taking notes on General Assembly proceedings, and providing administrative assistance
- Wrote position letters promoting the opinions of Georgia Chamber of Commerce and affiliated organizations

ADDITIONAL INFORMATION

- **Volunteer and Community Experience:** Intake Volunteer, Notre Dame Exoneration Justice Clinic (January 2022 – May 2022); Student Mentor, UGA Economics Society Mentor Program (February 2020 – January 2021)
- **Interests:** Classic Movies, Visiting MLB Stadiums, and Genealogy Research



UNIVERSITY OF GEORGIA

OFFICE OF THE REGISTRAR
ATHENS, GEORGIA 30602-6113

STUDENT ACADEMIC RECORD

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Fiona Liken
FIONA LIKEN
UNIVERSITY REGISTRAR

MONTH AND DAY OF BIRTH	STUDENT NAME					
13-SEP	William J Golden					
DEGREE OBJ.	COLLEGE OR SCHOOL	MAJOR				
See program information below.						
SPECIAL REQUIREMENTS ➔	REGENTS EXAM		HISTORY	CONSTITUTION		PHYSICAL EDUCATION
	ESSAY	READING		FEDERAL	GA.	
	OK	OK	OK	OK	OK	OK

DATE PRINTED	PAGE NO.	TRANSCRIPT CONTROL NUMBER
18-JAN-2022	1	DocumentID: 37554974
ISSUED TO:	William Golden	

Course Level: Undergraduate				SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
Program				Transfer Information continued:			
Bachelor of Arts				COMM 1100	Intro Public Speak	3.00 A	
College : College of Business				ENGL 1102	English Comp II	3.00 A	
Major : Economics				HIST 2112	Amer His Snc 1865	3.00 A	
Maj/Concentration : Public Policy				PSYC 1101	Elem Psychology	3.00 A	
Minor : Criminal Justice Studies				Ehrs: 12.00 GPA-Hrs: 12.00 QPts: 48.00 GPA: 4.00			
Secondary				Summer 2018 College Board AP			
Bachelor of Arts				BIOL 1107	Principles of Biology I	3.00 K	
College : School of Pub and Intl Aff				BIOL 1107L	Principles of Biology I Lab	1.00 K	
Major : Political Science				CHEM 1211	Freshman Chem I	3.00 K	
Minor : Criminal Justice Studies				CHEM 1211L	Freshm Chem Lab I	1.00 K	
Degrees Awarded Bachelor of Arts 14-MAY-2021				CHEM 1212	Freshman Chemistry II	3.00 K	
Primary Degree				CHEM 1212L	Freshman Chemistry Lab II	1.00 K	
College : College of Business				GEOG 1101	Human Geography	3.00 K	
Major : Economics				POLS 1101	American Government	3.00 K	
Maj/Concentration : Public Policy				STAT 2000	Introductory Statistics	4.00 K	
Minor : Criminal Justice Studies				Ehrs: 22.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00			
Inst. Honors: Magna Cum Laude				INSTITUTION CREDIT:			
Degrees Awarded Bachelor of Arts 14-MAY-2021				Fall 2018			
Primary Degree				CLAS 1010	Roman Culture	3.00 B	9.00
College : School of Pub and Intl Aff				ECON 2106	Principles of Microeconomics	3.00 A	12.00
Major : Political Science				FYOS 1001	First Year Odyssey	1.00 A-	3.70
Minor : Criminal Justice Studies				INTL 3300	Intro to Comp Pol	3.00 A-	11.10
Inst. Honors: Magna Cum Laude				LATN 1001	Elementary Latin I	4.00 A	16.00
SUBJ NO.	COURSE TITLE	CRED GRD	PTS R	Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 51.80 GPA: 3.70			
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:				Dean's List			
Fall 2017 U West Georgia				Good Standing			
ECON 2105	Prin Of Macroecon	3.00 A		Spring 2019			
ENGL 1101	English Comp I	3.00 A		LATN 1002	Elementary Latin II	4.00 A	16.00
HIST 2702	World Civ II	3.00 A		PHIL 2010	Introduction to Philosophy	3.00 A	12.00
MATH 1113	Precalculus	3.00 A		PHIL 2020	Logic and Critical Thinking	3.00 A	12.00
MATH 1TXX	Transfer Elective	1.00 A		POLS 4790	Sp Topics Amer Pol	3.00 A-	11.10
Ehrs: 13.00 GPA-Hrs: 13.00 QPts: 52.00 GPA: 4.00				Ehrs: 13.00 GPA-Hrs: 13.00 QPts: 51.10 GPA: 3.93			
Spring 2018 U West Georgia				Good Standing			
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ATHENS, GEORGIA 30602-6113

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Fiona Liken
FIONA LIKEN
UNIVERSITY REGISTRAR

MONTH AND DAY OF BIRTH	STUDENT NAME					
13-SEP	William J Golden					
DEGREE OBJ.	COLLEGE OR SCHOOL	MAJOR				
See program information below.						
SPECIAL REQUIREMENTS ➔	REGENTS EXAM		HISTORY	CONSTITUTION		PHYSICAL EDUCATION
	ESSAY	READING		FEDERAL	GA.	
	OK	OK	OK	OK	OK	OK

DATE PRINTED	PAGE NO.	TRANSCRIPT CONTROL NUMBER
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SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R	SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						Institution Information continued:					
Summer 2019						ECON 6750 Introduction to Econometrics					
MATH 2250E	Calculus I for Sci and Eng	4.00	B	12.00		POLS 3600	Criminal Just Admin	3.00	A	12.00	
POLS 4720E	Criminal Procedure	3.00	A	12.00		SOCI 3810W	Criminology	3.00	A	12.00	
Ehrs: 7.00	GPA-Hrs: 7.00	QPts: 24.00	GPA: 3.42			Ehrs: 17.00	GPA-Hrs: 17.00	QPts: 63.90	GPA: 3.75		
Good Standing						Dean's List					
Fall 2019						Good Standing					
ECON 4010	Intermediate Microeconomics	3.00	A-	11.10		Spring 2021					
LATN 2001	Intermediate Latin	3.00	A	12.00		EDIT 2000E	Intro to Computers for Teacher	3.00	A	12.00	
POLS 4150	Research Methods in Poli Sci	3.00	B+	9.90		EDIT 5100E	Assistive and Learning Tech	3.00	A	12.00	
POLS 4635	Politics of Income Inequality	3.00	A	12.00		PEDB 1950	FFL Walking	1.00	S	0.00	
POLS 4660	Southern Politics	3.00	A	12.00		Ehrs: 7.00	GPA-Hrs: 6.00	QPts: 24.00	GPA: 4.00		
Ehrs: 15.00	GPA-Hrs: 15.00	QPts: 57.00	GPA: 3.80			Good Standing					
Dean's List						***** TRANSCRIPT TOTALS *****					
Good Standing						Earned Hrs GPA Hrs Points GPA					
Spring 2020						TOTAL INSTITUTION 95.00 94.00 358.90 3.81					
ECON 4300	Public Sector Econ	3.00	A	12.00		TOTAL TRANSFER 47.00 25.00 100.00 4.00					
ECON 4450	Ecn Analysis of Law	3.00	A	12.00		OVERALL 142.00 119.00 458.90 3.85					
ECON 4600	Labor Economics	3.00	A	12.00		***** END OF TRANSCRIPT *****					
POLS 4020	Hobbes to Nietzsche	3.00	A-	11.10							
POLS 4600	Legislative Process	3.00	A	12.00							
POLS 5122	Campn Intern Essays	4.00	A	16.00							
Ehrs: 19.00	GPA-Hrs: 19.00	QPts: 75.10	GPA: 3.95								
Dean's List											
Good Standing											
Summer 2020											
ECHD 3170E	Drug and Alcohol Abuse Issues	3.00	A	12.00							
Ehrs: 3.00	GPA-Hrs: 3.00	QPts: 12.00	GPA: 4.00								
Good Standing											
Fall 2020											
CMLT 4260	The Black and Green Atlantic	3.00	A	12.00							
ECON 4020	Intermediate Macroeconomics	3.00	A	12.00							
ECON 5900	Senior Thesis	2.00	B	6.00							
***** CONTINUED ON NEXT COLUMN *****											



U. S. Department of Justice
Drug Enforcement Administration
Office of Chief Counsel

www.dea.gov

June 27, 2023

Dear Honorable Judge:

I understand that William Golden has applied for a clerkship with your court. Mr. Golden is an excellent writer, has strong analytical skills, and is self-sufficient. He will be a great addition to your chambers.

I had the opportunity to supervise his work when he served as a legal intern at DEA Headquarters during the summer of 2022. Mr. Golden was tasked with writing memoranda and executive summaries relating to the operational work of DEA, identifying risk areas and analyzing the law. His work needed little review and he understood how to tailor his writing to the audience and to meet mission needs of executives. Mr. Golden also provided several oral briefings to me and my colleagues, answering our questions and identifying areas which required further analysis – which he completed succinctly and professionally.

Should you have any questions regarding Mr. Golden's work, please do not hesitate to contact me at 213-923-0805 or reid.p.swayze@dea.gov.

Sincerely,

Reid Perry Swayze
Chief, Strategic Programs
Office of Chief Counsel
Drug Enforcement Administration

Notre Dame Law School
1100 Eck Hall of Law
Notre Dame, Indiana 46556

July 25, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

RE: Clerkship Application of William J. Golden

Dear Judge Browning:

I hope you are well. I am writing in support of the application of my student, William, who is a rising third-year student at Notre Dame Law School and has applied for privilege of serving as one of your law clerks.

I met William when he was a student in my large, required, first-year Criminal Law course. He was also one of my “mentees” through Notre Dame’s First Generation Professionals group, and he was an “Associate” with the Church, State & Society Program, which I direct. We had a number of conversations outside of class, including a few group-lunch gatherings, and I believe I came to know him. I was pleased to support his application to be an Assistant Rector in one of Notre Dame’s residence halls. All this is to say that I’ve enjoyed getting to know him, and that my impressions are positive. He strikes me as personable and easy-to-talk-to, in addition to being hard-working and intelligent.

As you can see from his transcript, he earned a “B+” grade from me in Criminal Law – which is above average, at Notre Dame – and his overall grade-point average is strong. He has been particularly dedicated to the work of our (relatively new) Exoneration Justice Clinic. Combined with his work experiences with the United States Attorney in the District of Columbia and with the Drug Enforcement Agency, this work has prepared him very well to engage and understand what was – in my experience, anyway – a substantial aspect of law clerks’ portfolios.

Notre Dame Law School does not “rank” our students, but William’s grades probably put him in the top third of his class. In addition, he is a very generous and active citizen here, and is involved in one of our journals as well as with a variety of student organizations. I am particularly grateful for his service as our Honor Council Prosecutor -- an important position that requires judgment and character.

I should note that, each year, because I teach a large first-year class, many good students ask me to write letters in support of their clerkship applications. I am happy to write these letters, because my own two years as a law clerk were wonderfully rewarding experiences, and the judges I was blessed with the opportunity to serve were great teachers and mentors for me. I am grateful to you, and to your colleagues, for your consideration and for the crucial role you play in law students’ formation.

William would be, I am confident, a reliable and valuable member of your office team, as well as an amiable colleague. His co-clerks would like him, and he’d treat the rest of your team with respect. I bet you wouldn’t mind eating a sandwich and sharing conversation with him around the conference table. I am happy to support his application. Please feel free to contact me if you have any questions about this letter.

Sincerely,

Richard W. Garnett
Paul J. Schierl / Fort Howard Corporation
Professor of Law

Richard W. Garnett - rgarnett@nd.edu - 574-631-6981

**Notre Dame Law School
1100 Eck Hall of Law
Notre Dame, IN 46556**

July 24, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing in support of William Golden, a rising third-year law student at Notre Dame Law School, who has applied for a judicial clerkship.

I am a law professor at Notre Dame Law School and Director of the Exoneration Justice Clinic (EJC). The EJC investigates and litigates wrongful conviction cases based on claims of actual innocence. We seek to correct the miscarriage of justice by vacating the wrongful conviction of our clients and assisting them in regaining their freedom.

William was a student in the EJC last academic year, both during the fall and spring semester. He was one of nine second-year law students selected from dozens of applicants to participate in the clinic. William was a productive and invaluable member of the EJC team.

The EJC students were assigned to intake teams where they evaluated requests from Indiana prison inmates for legal assistance. The students reviewed correspondence from the inmates and a detailed questionnaire filled out and submitted by them that provided detailed information about the criminal case. The students also reviewed published court opinions, open-source information relevant to the case, and interviewed witnesses. After completing the evaluation of their case, the students would draft an intake memorandum to the EJC staff lawyers recommending whether the case should be accepted or rejected for legal representation.

William was a passionate, dedicated, and tireless worker for our innocent clients. In fact, one of the intake cases that he worked on was accepted by the EJC for legal representation. William worked hundreds of hours on that case, convinced that the inmate had been wrongfully convicted and was innocent of the criminal charges.

In the student recommendation memorandum, William made cogent and compelling legal arguments that convinced the EJC staff lawyers to accept the inmate as a client. At the intake meeting, William did an outstanding job advocating for the inmate's innocence and defending his recommendation. His comments were thoughtful and reflected a solid understanding of the law and facts of the case.

In sum, William is an exceptionally smart, mature, responsible, and hard-working student. He is a strong leader, who leads by example and the force of his convictions. William is highly regarded and respected by the other EJC students and law faculty at Notre Dame.

It is for these reasons that I highly and enthusiastically recommend William Golden for a judicial clerkship. I am confident that if given the opportunity, he will make an invaluable contribution to the work of the court.

Sincerely,

Jimmy Gurulé
Professor of Law
Director, Exoneration Justice Clinic

Jimmy Gurule - Jimmy.Gurule.1@nd.edu - 574-631-5917

William Golden

Writing Sample Cover Sheet

The following writing sample is a slightly edited version of an assignment that I completed this past summer for a Senior Attorney within the Technology Section in DEA's Office of Chief Counsel. Drug-trafficking organizations have increasingly used unmanned drones in support of their operations. On occasion, these drones crash. My assignment was to develop an objective memorandum addressing the circumstances under which law enforcement may search an unattended drone pursuant to a theory that unattended drones have been abandoned. The assigning attorney reviewed the original assignment and approved this slightly edited version for use as a work sample after sensitive information was removed from the original assignment.

Memorandum



Subject Abandoned Drone Searches	Date 7/19/2022
-------------------------------------	-------------------

To
Stacey McReynolds & Tracy Suhr
Senior Attorneys, CCS

From
William Golden
Legal Intern

1. Questions Presented

Assuming that no other exceptions to the Fourth Amendment apply, under what circumstances can DEA agents search an unattended drone on the basis that it has been abandoned and therefore not entitled to Fourth Amendment protection?

2. Brief Answers

Drones can be searched when an individual has intended to relinquish their expectation of privacy, which can be indicated through “words, acts, and other objective facts.”¹ Common acts demonstrating an intent to abandon one’s expectation of privacy include a denial of an interest and the physical relinquishment of the searched property. Lost, misplaced, or intercepted drones would not constitute an abandonment because “there has to be some voluntary aspect...that [led] to the [object] being what could be called abandoned.”²

3. Background

Drug trafficking organizations (DTOs) sometimes use drones as an additional method to transport drugs. As the availability of drones increases, their usage by DTOs may also increase. On occasion, these drones crash. Other times, drones may be discovered while they remain on the ground. This memo analyzes whether the data stored on a drone that has crashed or is otherwise discovered by law enforcement can be searched without a warrant, on the basis that the drone has been abandoned.

4. Discussion

A. Abandonment Standards

In order for a defendant to argue that a search violated their Fourth Amendment rights, they must first demonstrate that they had a “reasonable expectation of privacy” in the searched area.³ If the defendant lacks a “reasonable expectation of privacy,” then police can proceed without a warrant. The voluntary

¹ *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984), quoting *United States v. Anderson*, 663 F.2d 934, 938 (9th Cir. 1981).

² *United States v. Small*, 944 F.3d 490, 503 (4th Cir. 2019).

³ See, e.g., *United States v. Clark*, 891 F.2d 501, 506 (4th Cir. 1989).

abandonment of property results in the loss of an individual's expectation of privacy.⁴ A police pursuit does not make the abandonment "involuntary."⁵ When introducing evidence obtained during a warrantless search, "the government bears the burden of proving the admissibility of evidence" by a preponderance of the evidence.⁶ The abandonment of property do not require the forfeiture of legal title or property interests, but rather require the person asserting Fourth Amendment protection to have forgone a "legitimate expectation of privacy in the invaded place."⁷

B. Abandonment

Abandonment inquiries are dependent "upon all relevant circumstances existing at the time" the search was conducted.⁸ While abandonment inquiries are indeed fact-specific matters, there are three general types of abandonment cases.⁹ In the first, a fleeing defendant relinquishes control over an item so as to make flight easier or to guarantee that they will not be caught in possession of the item. In the second, a defendant discards an item as trash, which police later recover. In the third, the defendant disavows having an interest in the item when questioned by police. Only the first and third types of abandonment cases appear relevant to searches of discovered drones.

When someone discards an item during a police pursuit, they may wish to recover it later, but in order to recover the discarded item, they must depend on third persons choosing not to access it. In *United States v. Jones*, the defendant, carrying a satchel, fled from police, discarding the satchel in a place that others could access.¹⁰ Police later found the satchel and searched it. The court upheld the search since the defendant had discarded the satchel and denied ownership of it when it was found. Likewise, the court in *Small v. United States* determined that the defendant had discarded, not lost as the defendant claimed, his phone while being pursued by police.¹¹ Therefore, the defendant forfeited his expectation of privacy in the contents of the phone, such as its location data and text messages.¹² Like the police in *Small*, who were able to inspect the data on the defendant's phone when he abandoned it, DEA agents could inspect a drone and its contents, including electronic data, once it has been abandoned.

By leaving an item in a public place, a defendant abandons their expectation of privacy.¹³ In *United States v. Voice*, the defendant was arrested away from an abandoned building, where he had been keeping his belongings.¹⁴ The court concluded that the defendant had lost his expectation of privacy in his belongings when he left his property "unattended in place that was accessible by third persons."¹⁵ Unmanned drones, unlike cars, do not require the operator to be in the same physical location. Cases involving the relinquishment of physical control of property may be inapplicable to drones since every

⁴ See *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983), quoting *United States v. Berd*, 634 F.2d 979, 987 (5th Cir. 1981).

⁵ *Id.*

⁶ *Small*, 944 F.3d at 502, quoting *United States v. Matlock*, 415 U.S. 164, 178 n.15 (1974).

⁷ *United States v. Oswald*, 783 F.2d 663, 666 (6th Cir. 1986), quoting *United States v. Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

⁸ See *United States v. Manning*, 440 F.2d 1105, 1111 (5th Cir. 1971).

⁹ *United States v. Basinski*, 226 F.3d 829, 837 (7th Cir. 2000).

¹⁰ See *Jones*, 707 F.2d at 837.

¹¹ *Small*, 944 F.3d at 503.

¹² *Id.* at 498.

¹³ See *United States v. Barlow*, 17 F.3d 85, 88 (5th Cir. 1994); see also *United States v. Thomas*, 864 F.2d 843, 846 (D.C. Cir. 1989) (expectation of privacy is reduced because the ability to recover property discarded in public is dependent on others who could physically access it).

¹⁴ *United States v. Voice*, No. 08-30101-01-KES, 2009 WL 614724, at *5 (D.S.D. Mar. 6, 2009), *aff'd*, 622 F.3d 870 (8th Cir. 2010) ("an individual has no reasonable expectation of privacy in areas that are accessible to third persons").

¹⁵ *Id.*; see also *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

unmanned drone flight necessitates the relinquishment of physical possession by the operator. However, the expectation of privacy in drones and their contents may also be lower since the operator is in a different physical location. Due to the inherent risk that a drone may crash in a different physical location, a reasonable person would have to accept the risk that a drone may crash in a public place, leaving it unattended for some time in an area “accessible by third persons.” Although a drone may crash in an area “accessible by third persons,” the crash itself is likely an unintended result of the operator and thus lacking of the “voluntary aspect” necessary to abandon the drone.

A suspect’s denial of a property interest in a searched area or item is a strong indication that they lack a subjective expectation of privacy in the area. In *United States v. Clark*, the defendant denied having any knowledge or interest in a suitcase, despite a ticket stub for it being found in his possession.¹⁶ The court concluded that the defendant did not display “an actual (subjective) expectation of privacy” and was thus precluded from arguing that the search violated the Fourth Amendment.¹⁷ Similarly, in *United States v. Nordling*, the suspect denied having any luggage when police asked.¹⁸ Police later discovered his luggage and searched it, finding cocaine. The court held that “the district court could well find [the defendant’s] actions were inconsistent with a continued expectation of privacy.”¹⁹ However, since drones do not require the physical possession of the operator, the likelihood that a suspect using a drone will be caught and questioned is much lower. Drones used for the transportation of drugs are often used in remote areas, where it may be difficult to locate the operator. Of course, suspects attempting to recover drugs from a drone could still be questioned.

C. Lost, Crashed, Discovered Drones

When a person loses property, they lack the “deliberate” intent required to abandon it.²⁰ In *United States v. Nealis*, the defendant left behind her purse in a hotel room, which a housekeeper discovered shortly after her checkout time.²¹ The housekeeper turned the purse into security, who then searched the purse in an attempt to identify its owner. Instead, the security officer found drugs and contacted police. The court held that the purse was not abandoned, but “owners of lost property must expect some intrusion by finders.”²² Accordingly, their expectation of privacy is reduced to the extent required to find the rightful owner. The government has a legitimate interest in performing limited searches in order to identify the owner of lost or stolen property.²³ However, while the *Small* court only briefly discussed the distinction between lost and abandoned property, it concluded that the defendant still would have had an expectation of privacy in “the simple loss of a cell phone” since “ordinary mishaps do not constitute abandonments.”²⁴

The discovery of an unattended drone is likely not sufficient to warrant an immediate and unlimited search of its contents pursuant to the abandonment exception. In *United States v. Abbott*, police officers searched a vehicle which they believed a fleeing suspect had abandoned.²⁵ The car was parked illegally, but otherwise resembled a parked car. The keys were gone, the engine was off, and the doors were closed. The

¹⁶ *United States v. Clark*, 891 F.2d 501, 507 (4th Cir. 1989).

¹⁷ *Id.*, quoting *Katz*, 389 U.S. at 361.

¹⁸ See *United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986).

¹⁹ *Id.* at 1470.

²⁰ *Id.*

²¹ See *United States v. Nealis*, 180 F. Supp. 3d 944, 947 (N.D. Okla. 2016).

²² *Id.* at 950.

²³ See also *United States v. Sumlin*, 909 F.2d 1218 (8th Cir. 1990) (government has a legitimate interest in the identification and recovery of stolen property); *United States v. Catlett*, No. CRIM. A. 09-122-KKC, 2010 WL 1643774 (E.D. Ky. Jan. 14, 2010) report and recommendation adopted, No. CRIM. A. 5:09-122, 2010 WL 1643773 (E.D. Ky. Apr. 21, 2010) (“The government has a strong interest in identifying and returning lost and stolen property, which outweighs any casual possessory interest of the defendant.”).

²⁴ *Small*, 944 F.3d at 502-03 (internal quotations omitted).

²⁵ See *United States v. Abbott*, 584 F. Supp. 442, 451 (W.D. Pa. 1984), *aff’d*, 749 F.2d 28 (3d Cir. 1984).

court held that these facts alone were not sufficient to presume that the car had been abandoned. Since drones can be remotely operated, there may be some time between the landing and retrieval of a drone. Thus, an unattended drone might not be abandoned, but rather awaiting retrieval by its operator. In order to search a drone as abandoned, police must first determine that the drone is in fact abandoned – not unattended or lost.

However, after a significant amount of time has passed, the search of an unattended drone may be warranted as abandoned property. In *United States v. Oswald*, the defendant abandoned a cocaine-filled briefcase after his car caught on fire.²⁶ A few hours later, police searched the briefcase and discovered its contents. The court upheld the search since it was reasonable to conclude that a person with an expectation of privacy in the contents of the briefcase would have come forward within the first few hours after the fire.²⁷ Although the *Oswald* court concluded a few hours was sufficient to hold that the defendant had abandoned the briefcase, another court, in *United States v. Mulder*, held that the defendant still had an expectation of privacy in items recovered from his hotel room, even though he had failed to check out on time and did not return until two days after his original departure date.²⁸ In most situations, time is a relevant circumstance in determining if a drone has been abandoned, but as the comparison of *Oswald* and *Mulder* demonstrates, time remains only *one* of the relevant circumstances.

D. Abandonment Pursuant to Policy

In *Abbott*, the court cited department policy defining abandoned vehicles, which the officers did not follow, as evidence that the officers did not believe the vehicle was actually abandoned.²⁹ Similarly, there are at least three regulations establishing time constraints for how long property can be left unattended on federal lands.³⁰ However, officials are not precluded from searching the abandoned property sooner if the possessor has demonstrated an intent to reduce their expectation of privacy in the property. Thus, these regulations represent the maximum amount of time that federal officials would have to wait before seizing and searching unattended or abandoned property. For example, a National Park Service regulation prohibits “(2) Leaving property unattended for longer than 24 hours, except in locations where longer time periods have been designated... (b)(1) Property determined to be left unattended in excess of allowed period of time may be impounded.”³¹ Since property “left unattended in excess of the allowed period” could be accessed by the impounding officials, it would be due a lower expectation of privacy. However, the enactment of these regulations was more likely related to the property rights notion of abandonment than its constitutional definition. Ultimately, they likely represent no more than evidence of an intent to abandon since the owner has abandoned their property interest in them. Once a property interest has been abandoned, it would seem more difficult to argue that a former possessor retained an expectation of privacy in an item in which they no longer had a possessory interest.

5. Conclusion

There are some limited circumstances in which a crashed or unattended drone may be considered abandoned. However, in most circumstances, DEA agents would have to distinguish between drones awaiting retrieval and those that have been abandoned. A drone that appears to have crashed, especially recently, may not be abandoned but instead unattended or lost. Absent an intentional act, an individual would maintain an expectation of privacy in the contents of the drone. However, DEA agents could perform

²⁶ See *Oswald*, 783 F.2d at 663.

²⁷ *Id.* at 667.

²⁸ See *United States v. Mulder*, 808 F.2d 1346, 1347-48 (9th Cir. 1987).

²⁹ *Abbott*, 584 F. Supp. at 452.

³⁰ See 36 C.F.R. § 2.22 (2022); 43 C.F.R. § 8365.1-2 (2022); 50 C.F.R. § 28.41 (2022).

³¹ 36 C.F.R. § 2.22 (2022).

a limited search in furtherance of a legitimate governmental interest, such as identifying the owner of a lost drone. Other exceptions to the warrant requirement may be better suited for discovered drones. On that note, drones may be entitled, like cars, to a lower expectation of privacy since drones are “a readily mobile vehicle.”³²

³² See *United States v. Howard*, 489 F.3d 484, 493 (2d Cir. 2007) (“Whether a vehicle is ‘readily mobile’ within the meaning of the automobile exception has more to do with inherent mobility of the vehicle...”); see also *Abbott*, 584 F. Supp. at 445 (the twin justifications for the automobile exception are “exigency due to mobility” and “a diminished expectation of privacy” in automobiles, which could both be offered in support for a “drone exception” to the warrant requirement).

William Golden

Writing Sample Cover Sheet

The following writing sample is an excerpt from a brief that I wrote for my first-year Legal Writing class during the Spring 2022 semester. This was an open research assignment that served as our final exam. While each person was assigned a partner for completing the whole brief, each partner was responsible for researching a distinct legal issue and writing their own argument section. I have included only my portion of the writing. Nobody else edited this sample. For this brief, my partner and I won the Best Brief Award for Excellence in Persuasive Writing in our Legal Writing section.

The following facts pertaining to the 4th Amendment issue are summarized from the record given to us for the assignment:

The appellant, Mark Preston, is a fraternity member accused of selling drugs on campus, based on physical evidence collected in a warrantless search of his bedroom and bathroom. DEA agents received consent for the search from Mr. Preston's roommate, Helena Kaplan. Before consenting to a search of the entire apartment, including Mr. Preston's bedroom and bathroom, Ms. Kaplan explained to the officers that the roommates shared the common spaces of the apartment equally. However, Ms. Kaplan also explained that she and a third roommate shared a separate bathroom. Ms. Kaplan informed the agents that she had permission to take a bath in Mr. Preston's bathroom if she wished, as his bathroom had the only bathtub in the apartment. Mr. Preston moved to suppress the physical evidence on the grounds that the search of his bathroom was conducted illegally, alleging that Ms. Kaplan lacked actual and apparent authority to consent to that search. The trial court denied Mr. Preston's Motion to Suppress Physical Evidence. As a result, Mr. Preston entered into a conditional guilty plea on the count of possession and appealed the denial of the Motion to Suppress Physical Evidence.

This attached excerpt argues on behalf of the United States, the appellee, that the trial court did not err in denying Defendant's Motion to Suppress Physical Evidence.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED DEFENDANT’S MOTION TO SUPPRESS PHYSICAL EVIDENCE BECAUSE DEFENDANT’S CO-TENANT, MS. KAPLAN, POSSESSED AUTHORITY TO CONSENT TO A SEARCH OF THE BATHROOM AND THE UNMARKED BAG, IN WHICH COCAINE WAS FOUND.

A co-tenant may consent to a search of the premises in the absence of a non-consenting party when they have (1) actual authority or (2) apparent authority over the premises. *See Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990). *See also United States v. Matlock*, 415 U.S. 164, 170 (1974). A co-tenant has actual authority when they have common authority over the search area. Common authority is the “mutual use of the property by persons generally having joint access or control.” *Matlock*, 415 U.S. at 171 n.7. In *Groves*, this Court listed several factors to assist district courts in their factual determinations in evaluating the presence of actual or apparent authority. *United States v. Groves*, 530 F.3d 506, 509–510. Even if actual authority is lacking, a search is permissible if the officers reasonably, although erroneously, conclude that the co-tenant had actual authority. *Illinois v. Rodriguez*, 497 U.S. at 188–89. An officer acted reasonably if a person of reasonable caution would conclude that the consenting party had authority over the search, given “the facts available to the officer at the moment.” *Id.*

Furthermore, consent searches pose an important exception to the Fourth Amendment’s warrant requirement. They provide law enforcement with a necessary, investigatory tool, easing their burden in providing for the just and efficient resolution of violations of the law.

Accordingly, since a search is permissible if the consenting party possessed either actual or apparent authority over the search area, this Court should affirm the district court’s denial of Defendant’s Motion to Suppress Physical Evidence because Ms. Kaplan possessed (1) actual and (2) apparent authority.

A. Ms. Kaplan possessed the actual authority necessary to consent to a search of the bathroom and the bag since Defendant granted her permission to use the bathroom.

In the absence of a non-consenting party, the consent of a co-tenant is valid when they possess common authority, which the *Matlock* Court defined as “the mutual use of property by persons generally having *joint access* or control.” *Matlock*, 415 U.S. at 171 n.7 (1974) (emphasis added). *See also Georgia v. Randolph*, 547 U.S. 103, 121 (2006) (holding that “if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector...loses out”).

By permitting joint use of an area, a co-tenant reduces their expectation of privacy in the shared space to a degree that their co-tenant has actual authority to consent to a search of the shared space. In *Frazier*, the defendant jointly used a duffel bag with his cousin. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). Police arrested the defendant’s cousin, who then consented to a search of the shared bag. *Id.* The Court held that since he was a “joint user of the bag, he clearly had authority to consent to its search” since one cannot permit use and expect to maintain the same level of privacy. *Id.* *See United States v. Ladell*, 127 F.3d 622, 624 (7th Cir. 1997) (holding “one ordinarily assumes the risk that a co-tenant might consent to a search, at least to all common areas and those area to which the other has access”). On this basis, the Court in *Matlock* expanded the consent standard from joint use to “the mutual use of property by persons generally having *joint access* or control.” *Matlock*, 415 U.S. at 171 n.7 (1974) (emphasis added). Thus, an individual with joint access – or the permission to enter a shared area – can authorize a search in the same manner that a joint user can because a co-tenant granting permission is aware that another may use the space and assumes the risk that someone with access may consent to a search of the shared space. *See also United States v. Duran*, 957 F.2d 499, 505 (7th Cir. 1992) (distinguishing between access to an area from actual use of that area). In *Duran*, the defendant’s wife consented to the search of a

farmhouse that only her husband used. *Id.* at 504. Although she had never entered the building, this Court held that she had actual authority over it and could consent to a search because she “was not denied access...but rather made it a habit not to enter the building.” *Id.* at 505. Thus, in *Duran*, this Court held access was sufficient to render common authority over never used, but shared and accessible premises. Additionally, this Court contrasted the relationship between husband and wife with the relationship of two friends, holding that “[t]wo friends...might reasonably expect to maintain exclusive access to their respective bedrooms....” *Id.* See also *United States v. Barrera-Martinez*, 274 F. Supp. 2d 950, 962 (N.D. Ill. 2003) (holding roommates do not have actual authority unless there are specific facts to the contrary). A co-tenant's authority rests upon the expectation of privacy between two persons, which, as this Court has suggested, is normally greater between two friends than spouses.

This Court has suggested several factors on which the district courts should base their legal determinations of actual authority. In *Groves*, the defendant's girlfriend consented to a search of the apartment. *Groves*, 530 F.3d at 508. This search recovered physical evidence. *Id.* The defendant moved the court to dismiss the recovered evidence, but the district court denied the motion. On appeal, this Court remanded the case to the district court so that they could make additional factual determinations necessary for this Court to reach a legal conclusion. This Court highlighted several factors that the district court should consider in evaluating authority:

- (1) possession of a key to the premises;
- (2) a person's admission that she lives at the residence in question;
- (3) possession of a driver's license listing the residence as the driver's legal address;
- (4) receiving mail and bills at that residence;
- (5) keeping clothing at the residence;
- (6) having one's children reside at that address;
- (7) keeping personal belongings such as a diary or a pet at that residence;
- (8) performing household chores at

the home; (9) being on the lease for the premises and/or paying rent; and (10) being allowed into the home when the owner is not present.

Id. at 509–510. The factors are not intended to be an exhaustive list but a list of factors that will help guide the district court’s factual inquiry so that it can arrive at a sound legal conclusion. *Id.* at 509. A motion to suppress is a fact-specific matter. Accordingly, deference should be given to the district court’s factual determinations since the district court “had the opportunity to listen to testimony and observe the witnesses at the suppression hearing.” *Id.* at 510 (quoting *United States v. Hendrix*, 509 F.3d 362, 373 (7th Cir. 2007)). For example, in *Barrera-Martinez*, the district court held “it reasonable to presume that roommates do not have actual authority to consent to a search of another roommate’s room *unless there are specific facts that would indicate otherwise.*” *Barrera-Martinez*, 274 F. Supp. 2d at 95 (N.D. Ill. 2003) (emphasis added). Thus, even when the typical situation is unreasonable, specific facts may alter the court’s reasonableness determination.

Here, by authorizing Ms. Kaplan’s use of the bathroom, Defendant reduced his expectation of privacy to such a degree that granted Ms. Kaplan sufficient authority over the bathroom. Like the cousin in *Frazier*, who was a joint user of the duffel bag, Ms. Kaplan is a joint user of the bathroom and thus possesses actual authority to consent to a search of the bathroom. Although it is clear Ms. Kaplan used the bathroom and is a joint user, she would have possessed actual authority even if she never used the bathroom since Defendant granted her access to use it. In *Duran*, the wife had actual authority over an area, despite never using the area where she was permitted to go. Likewise, even if Ms. Kaplan never used the bathroom, she still would have possessed actual authority since Defendant permitted her to use it. Whereas two friends might expect to possess the sole authority to consent to a search of their bedrooms and other private areas, Defendant did not expect to maintain exclusive access to the bathroom since it was a shared space.

He permitted Ms. Kaplan to use the bathroom, which allowed her to access it. Defendant could not have expected to maintain the same level of privacy in the bathroom, while simultaneously permitting Ms. Kaplan access to it. Defendant assumed the risk that Ms. Kaplan might consent to a search of all common areas, including their shared bathroom, when he permitted her to use those areas, regardless of the frequency at which she used them.

Furthermore, the district court based its legal conclusion on several of the *Groves* factors present, which should receive deference. Ms. Kaplan possessed a key to her room. She acknowledged that she paid rent to live at the apartment that she shared with Defendant. She was allowed to remain in the residence when nobody else was present. In fact, she was the only one present when Special Agents Hill and Renko arrived at the residence. Relying on these factual determinations, the district court concluded that she was a co-tenant who possessed authority over the shared spaces of the apartment. Since the district court had the ability to hear and take testimony of witnesses, this Court should defer to the district court's factual determinations. In addition, the district court's legal conclusion that she had actual authority rests squarely upon these factual conclusions. Likewise, the district court's legal conclusion should also be left undisturbed since the district court did not make a mistake of law.

Since the bathroom was a shared space in the apartment, Ms. Kaplan, who had joint access and control over it, possessed the authority to consent to its search. This Court should defer to the district court's factual conclusions upon which its legal conclusions are well-founded.

B. Since officers reasonably concluded that Ms. Kaplan possessed authority over the unmarked, black toiletries bag because she had previously used the bathroom, the search was permissible.

The language of the Fourth Amendment prevents unreasonable searches. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects,

against *unreasonable* searches and seizures, shall not be violated....”) (emphasis added). However, it does not prevent all searches which emerge as factually incorrect. *Illinois v. Rodriguez*, 497 U.S. at 184 (The Fourth Amendment “does not demand that the government be factually correct in its assessment.”). Even if a person lacks authority, a search is permissible if “the facts available to the officer at the moment...warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.” *United States v. Jackson*, 598 F.3d 340, 346 (7th Cir. 2010) (internal quotations omitted) (quoting *Illinois v. Rodriguez*, 497 U.S. at 188).

When an individual possesses actual authority to consent to a search of an area, they possess apparent authority over containers which may hold the object of the search, absent evidence that they lack authority over the container. In *Melgar*, police arrested a woman, Velazquez, who had rented a hotel room. *United States v. Melgar*, 227 F.3d 1038, 1039 (7th Cir. 2000). She gave officers general consent to search the room for counterfeit checks. *Id.* Although she did not explicitly grant permission for a search of the closed containers within the room, she was aware that the officers were searching for counterfeit checks which could fit inside those containers. Other individuals, including the defendant, Melgar, and their belongings were present in the room at the time Velazquez consented to the search. *Id.* While conducting their search, police discovered a floral purse with no personalized markings on the outside. *Id.* at 1041. In it, they discovered the counterfeit checks. *Id.* The defendant argued that Velasquez’s consent was invalid since police had no reason to believe the purse was under her control. *Id.* This Court held that the search of the closed container did not violate the Fourth Amendment since consent to search an area generally extends to containers therein and “the police had no reason to believe that Velasquez could not consent.” *Id.* at 1041–42. This Court distinguished *Melgar* from its earlier decision in *United States v. Rodriguez* by treating a container with personalized markings differently from a

container without them. *United States v. Rodriguez*, 888 F.2d 519, 523 (7th Cir. 1989). In *United States v. Rodriguez*, the defendant's estranged wife consented to a search of an area where the defendant kept his belongings. *Id.* at 522. In the course of the search, agents opened a briefcase labeled with the defendant's name. *Id.* While this Court held that the possession of a key was sufficient to show that the estranged wife had apparent authority to consent to the search of the room, the Court held that "opening the briefcase and the file box marked [with the defendant's name] is harder to justify." *Id.* at 523, 525. *See also United States v. Basinski*, 226 F.3d 829, 834–35 (7th Cir. 2000) (listing factors aiding in the reasonableness determination, including the nature of the container, external markings, and precautions taken to ensure privacy).

Law enforcement officers only have an affirmative duty to inquire about questionable facts, not facts that are ambiguous. In *Richards*, a homeowner consented to a search of a bedroom which the defendant occupied. *United States v. Richards*, 741 F.3d 843, 848 (7th Cir. 2014). At the time of the search, there was an unlocked padlock on the door to the room. *Id.* at 846. Officers were unaware that the homeowner did not have a key to the padlock. Defendant argued that the presence of a padlock "placed a duty on the officers to eliminate the possibility of an atypical living arrangement." *Id.* at 851. This Court held that the officers had apparent authority to enter the room and that they did not have an affirmative duty to determine if the padlock belonged to the homeowner. *Id.* Compare *Randolph*, at 547 U.S. 122, 126 (holding that *Illinois v. Rodriguez* held it "unjustifiably impracticable to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority is apparent") with *Montville v. Lewis*, 87 F.3d 900, 903 (holding that a duty is imposed on law enforcement when the surrounding circumstances make that person's authority questionable). In *Richards*, the authority of the homeowner is unclear due to the presence of a padlock, while in *Barrera-Martinez*, the authority of the co-tenant is

questionable, given the facts available to the officer at the time. *Barrera-Martinez*, 274 F. Supp. 2d at 962 (N.D. Ill. 2003). In *Barrera-Martinez*, DEA agents asked a co-tenant for consent. *Id.* The co-tenant only consented to a search of his room, which the officers knew was separate. There was no indication that the co-tenant had a privacy interest in the defendant's room. *Id.* Thus, it was doubtful that he could consent since most co-tenants lack an interest in their co-tenants' rooms. *See United States v. Aghedo*, 159 F.3d 308 (7th Cir. 1998) (holding there is a rebuttable presumption that co-tenants have exclusive control over their rooms).

Here, like the consenting party in *Melgar*, Ms. Kaplan gave general consent to a search of the apartment. Similarly, to *Melgar*, she was aware that the items for which the special agents were looking could have been concealed in the unmarked bag. Like *Melgar*, Ms. Kaplan's consent would extend to containers which could contain the object of the search. Furthermore, the unmarked bag in which the drugs were found is similar to the purse in *Melgar*. The purse in *Melgar* lacked external markings which would specifically indicate authority, like the bag in which the cocaine was found. The bag was unlocked and on an open shelf. Whoever controlled the bag did not closely guard it and its contents were likely not private. Like the officer in *Melgar*, Special Agent Hill erroneously, but reasonably, concluded that the unmarked bag belonged to Ms. Kaplan since there were no external markings to indicate that she did not have authority over it. Additionally, like the officer in *Melgar*, Special Agent Hill had no reason to believe that Ms. Kaplan could not consent. In contrast, the briefcase in *United States v. Rodriguez* had external markings which indicated ownership. The briefcase in *United States v. Rodriguez* was marked with the defendant's name, while in our case the bag lacks external markings dispositive to its authority.

In addition, Special Agents Hill and Renko did not have an affirmative duty to ask Ms. Kaplan about authority over the bag since it was only unclear that she possessed authority over it.

The surrounding circumstances did not raise questions about Ms. Kaplan's actual authority over the bag. Defendant had granted her permission to use the bathroom. It is reasonable to assume that Ms. Kaplan could control an unmarked bag in an area where she had actual authority. The bathroom was a shared space that she recently used to get ready for school and the unmarked bag could have certainly been hers, although it is unclear whether it actually was. Additionally, Ms. Kaplan's signed consent form is an indication that officers believed given the facts available to them that she could authorize a search of the apartment. Since authority over the bag is unclear, it is more similar to the homeowner's authority in *Richards* than it is to the co-tenant's authority in *Barrera-Martinez*. Unlike in *Barrera-Martinez*, where it was doubtful that one co-tenant could consent to a search of the bedroom of another, it is not doubtful that Ms. Kaplan could control an unmarked bag in a shared space. There is not a rebuttable presumption that co-tenants have exclusive control over containers in shared spaces. If police had to inquire about the authority of every unmarked container in a shared space, Special Agents Hill and Renko would have to inquire about the authority of most containers in the apartment. Those inquiries would severely delay and hamper consent searches, rendering an effective law enforcement tool useless.

The district court properly denied Defendant's Motion to Suppress Physical Evidence. Defendant's co-tenant, Helena Kaplan, possessed actual authority over the bathroom since she had permission to access it and had done so previously. Furthermore, this Court should defer to the district court's factual determination that a reasonable person would conclude that Ms. Kaplan possessed authority over the unmarked bag where the drugs were found since Defendant has failed to show that district court's factual determination was clearly mistaken. We respectfully ask this Court to affirm the district court's denial of Defendant's Motion to Suppress Physical Evidence.

Applicant Details

First Name **Paula Victoria**
 Last Name **Holmberg**
 Citizenship Status **Lawful permanent residents who are seeking citizenship as outlined in 8 U.S.C. Â§ 1324b(a)(3)(B)**

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Date of JD/LLB **May 1, 2024**

Class Rank **10%**

Law Review/Journal **Yes**

Journal(s) **Hastings Business Law Journal**

Moot Court Experience **Yes**

Moot Court Name(s) **David E. Snodgrass Moot Court Competition, 2022-2023**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

Silva, Elizabeth
esilva@sftc.org
Dolkas, Professor Jamie
dolkasj@uchastings.edu

References

Judge Andrew Y.S. Cheng: 415-551-3840, acheng@sftc.org.

Professor Elizabeth Fishman: 415-369-5332,
elizabeth.s.fishman@gmail.com.

Professor Clark Freshman: 305-799-7432, freshman@uchastings.edu.

Ms. Megan Beshai: 541-740-9220, mbeshai@sftc.org.

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

Victoria Paula Holmberg

2164 Beach Street • San Francisco CA 94123 • vholmberg.uchastings.edu • 415-691-0576

[linkedin.com/in/victoriaholmberg](https://www.linkedin.com/in/victoriaholmberg)

July 11, 2023

The Honorable James O. Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning,

I am writing to you as an individual passionate about serving others, and want to do so as a litigator. My intellectual curiosity and drive led me to permanently move from Sweden, where jurors are virtually nonexistent, to practice law in U.S.A., where litigators can truly serve their clients as advocates before the people. I feel incredibly drawn to your chambers, the beauty of New Mexico, and for the opportunity to learn from a Judge with extensive trial experience. Following my 2024 graduation, I would be honored to serve in your chambers during the 2024-2025 clerkship term.

As a top student with honors and high marks, I was able to transfer to Hastings (now UC Law SF). I was invited to join the David E. Snodgrass Moot Court competition, and elected to Hastings Business Law Journal's executive board, where I honed my writing and argument skills. Being involved with this work, and various other student bodies, boards and government, has allowed me to learn to effectively manage a high volume of tasks independently while also collaborating, understanding the needs of a team and managing up.

During the last two years, I have had the opportunity to experience three rewarding judicial externships. First, my time observing Magistrate Judge Westmore and her staff introduced me to judicial work first-hand. Second, while serving for Judge Cheng in the Complex Litigation department, I learned to thrive in a dynamic environment by regularly discussing multiple cases post-hearings in chambers. There, I also honed my writing abilities, and prepared dozens of memoranda and draft orders. Third, as a current extern for the Ninth Circuit, I have the privilege of being exposed to, and learned how to self-master, a multitude of foreign bodies of law and issues using CM/ECF and PACER, and draft dispositions based on my legal research and analysis. I quickly learned the skills of effective communication by orally presenting cases and answering questions from a three-judge panel.

I would be honored to serve with you and your staff in a clerkship as a right-hand, go-to person. I am available to travel for an interview at your convenience and would greatly enjoy meeting you. Please contact my recommenders Professor Elizabeth Fishman (elizabeth.s.fishman@gmail.com); Professor Clark Freshman (freshman@uchastings.edu); Ms. Megan Beshai (MBeshai@sftc.org); and Judge Andrew Y.S. Cheng (acheng@sftc.org) if you have any questions. Thank you for your consideration.

Sincerely,



Victoria Paula Holmberg

Victoria Paula Holmberg

2164 Beach Street • San Francisco CA 94123 • vholmberg.uchastings.edu • 415-691-0576

[linkedin.com/in/victoriaholmberg](https://www.linkedin.com/in/victoriaholmberg)

EDUCATION

University of California, Law, San Francisco (formerly UC Hastings), San Francisco, CA

Juris Doctor Candidate, May 2024

Hastings Business Law Journal, Executive Development Editor, 2023-2024; Staff Editor (2022-2023), *Note being considered for publication*, Fall 2023

David E. Snodgrass Moot Court Competition, 2022-2023

Startup Legal Garage, Corporate Module (Student Associate), 2023-2024

Honors: "CALI Excellence for the Future Awards" in Negotiation and Practical Civil Litigation

Leadership: UClas (Student Government) (*Government Representative, Finance Committee, Advocacy, Committee 2022-2023; Secretary 2023-2024*); Teaching Assistant (Negotiation, Fall 2023)

Volunteer: Pro Bono Society Pledge; StreetLaw x Kirkland; Women's Law Society (Peer Mentor)

Golden Gate University School of Law, San Francisco, CA

First-year coursework, 2021 – 2022

GPA: 3.74 (Top 6%), Dean's List, invited to join Law Review, Dean's Scholarship (Full Scholarship)

Honors: "CALI Excellence for the Future Awards" in five courses (Torts, Contracts I, Legal Writing & Research I, Lawyering: Intro Litigation, and Evidence)

Activities: Society of Litigators (Representative); In Vino Veritas Mock Trial (Volunteer); NAAC Moot Court Competition (Bailiff); 1L Mock Trial Competition (Participant)

Stockholm University, Stockholm, Sweden

Bachelor of Business Administration; Minor in Management, June 2021, **GPA:** 3.92

Thesis: "A Discourse Analysis: How Multinational Corporations Manage Legitimacy and Justify Ethically Dubious Practices through External Communications"

EXPERIENCE

Office of Staff Attorneys, U.S. Court of Appeals for the Ninth Circuit, San Francisco, CA

Federal Appellate Extern, May – August 2023

- Orally presented civil cases and answered questions each month before a three-judge panel
- Researched, analyzed issues, drafted proposed memoranda opinions, case packets, and visual aids for panels

The Honorable Andrew Cheng, Complex Litigation Dept., S.F. Superior Court, San Francisco, CA

Complex Litigation Extern, January – April 2023

- Drafted memoranda to Judge Cheng and Judge Schulman with recommendation on parties' motions (e.g., for summary judgment, for judgment on the pleadings, to seal, for complex litigation designation)
- Conducted legal research and drafted court orders
- Observed hearings and debriefed with Judge Cheng three times a week

Summer Trial and Evidence Program (1st STEP), San Francisco, CA

Participant (full-time 40 hours per week intensive program), May – July 2022

- Prepared for and argued mock trials; tendered experts, responded to hearsay objections, examined witnesses, entered evidence, and presented opening and closing arguments
- Drafted motions (e.g., in limine, suppress, summary judgment) and *voire dire*
- Made weekly oral and written arguments before Alameda County Superior Court Judge Steckler
- Focused on evidentiary rules, trial advocacy, motion and brief writing

The Honorable Kandis Westmore, U.S.D.C., Northern District of CA, Oakland, CA

1L Open Doors Program, March 2022

- Attended criminal pre-trial release hearings and antitrust closing statements

PROFESSIONAL CERTIFICATIONS

Court Certified Law Student, State Bar of California (August 2022)

LANGUAGES AND INTERESTS

Fluent Swedish; Conversational Thai; Intermediate Spanish

Cross-country and downhill skiing, gravel biking, and sailing

Paula Louise V Holmberg

Golden Gate School of Law Transcript Birth Date: 10/01/1995

SSN: XXX-XX-0321

Student ID: 0602942

18 Aug 2022

Page: 1 of 1

Fall 2021						GPA	
LAW		Grade	Attmpd	Cmpltd	GrdPts		
LAW	700A CIVIL PROCEDURE I	B+	3.00	3.00	9.99		
LAW	705A CONTRACTS I	A	3.00	3.00	12.00		
LAW	710 CRIMINAL LAW	B+	3.00	3.00	9.99		
LAW	720 TORTS	A	4.00	4.00	16.00		
LAW	725A LEGAL WRITING & RESEARCH I	A-	2.00	2.00	7.34		
						Term	Cum
						15.00	3.688

Dean's List

Spring 2022						GPA	
LAW		Grade	Attmpd	Cmpltd	GrdPts		
LAW	700B CIVIL PROCEDURE II	A	3.00	3.00	12.00		
LAW	705B CONTRACTS II	A	3.00	3.00	12.00		
LAW	715 PROPERTY	B+	4.00	4.00	13.32		
LAW	725B LEGAL WRITING & RESEARCH II	A-	3.00	3.00	11.01		
LAW	706Z LAWYERING: INTRO LITIGATION	A	2.00	2.00	8.00		
						Term	Cum
						15.00	3.722

Dean's List

Summer 2022						GPA	
LAW		Grade	Attmpd	Cmpltd	GrdPts		
LAW	804T TRIAL EVIDENCE & ADVOCACY	A-	5.00	5.00	18.35		
LAW	804M BRIEF WRITING & MOTION ADVOC	A-	2.00	2.00	7.34		
LAW	804 EVIDENCE	A+	4.00	4.00	16.00		
						Term	Cum
						11.00	3.740

 Attempted Cred.: 41.00
 Completed Cred.: 41.00
 GPA Credits....: 41.00
 Grade Points....: 153.34
 Cum GPA.....: 3.740

Comments

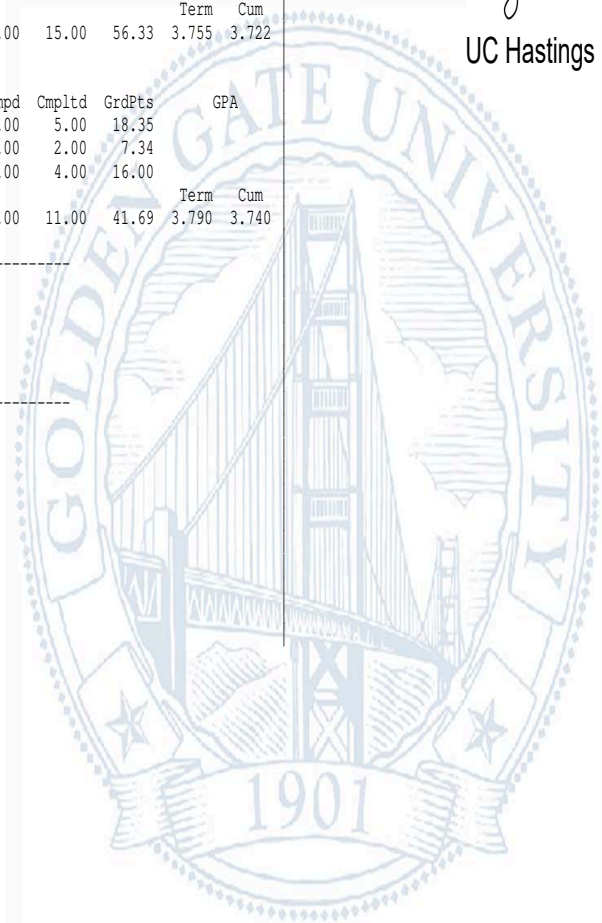
Juris Doctor: CALI Award: Torts
 CALI Award: Writing & Research I
 CALI Award: Contracts I
 CALI Award: Lawyering: Intro Litigation
 CALI Award: Evidence

End of official record.

Official copy received 08/18/2022 by:



UC Hastings Registrar



University of California
College of the Law, San Francisco

NAME: Paula Louise Victoria Holmberg
Academic Program: JD

Printed: 07 Jun 2023
ID No.: 0594817

Page: 1 of 1

21/YR YEARLONG 2021

TRANSFER CREDITS FROM GOLDEN GATE UNIVERSITY SCHOOL OF LAW

CIVIL PROCEDURE	105	CR	T	0.0	3.0	0.00
CONTRACTS	110	CR	T	0.0	3.0	0.00
CRIMINAL LAW	115	CR	T	0.0	3.0	0.00
LEGAL RESEARCH & WRITING I	131	CR	T	0.0	2.0	0.00
CIVIL PROCEDURE 2	275	CR	T	0.0	3.0	0.00
CONTRACTS 2	300	CR	T	0.0	3.0	0.00
PROPERTY	125	CR	T	0.0	4.0	0.00
LAWYERING: INTRO LITIGATION		CR	T	0.0	2.0	0.00
TORTS	130	CR	T	0.0	4.0	0.00
LEGAL RESEARCH & WRITING 2	970	CR	T	0.0	3.0	0.00
EVIDENCE	368	CR	T	0.0	4.0	0.00

0.0 34.0 0.00 0.000 0.000

22/FA FALL 2022

APPELLATE ADVOCACY: CIVIL	821	13	B+	N	2.0	2.0	0.00
JOURNAL MEMBERSHIP	985	11	CR	N	1.0	1.0	0.00
FEDERAL INCOME TAX: UPR DIV	540	11	A-	I	3.0	3.0	11.10
REMEDIES	552	11	B+	I	3.0	3.0	9.90
CONSTITUTIONAL LAW I	120	11	B+	R	3.0	3.0	9.90

12.0 12.0 30.90 3.433 3.433

23/SP SPRING 2023

LEADERSHIP SKILLS FOR LAWYERS	827	21	A	N	2.0	2.0	0.00
PROFESSIONAL RESPONSIBILITY	529	21	B	I	2.0	2.0	6.00
ANTITRUST & INTELLEC PROPERTY	700	21	B+	I	2.0	2.0	6.60
WRITING REQ'T FOR LAW 70021	998	33	M	N	0.0	0.0	0.00
PRACTICAL CIVIL LITIGATION	512	21	A+	I	2.0	2.0	8.60
JUDICIAL EXTERNSHIP: CLASS CO	899	21	CR	N	1.0	1.0	0.00
JUDICIAL EXTERNSHIP FWK	940	21	CR	N	5.0	5.0	0.00
NEGOTIATION	838	26	A+	N	3.0	3.0	0.00

17.0 17.0 21.20 3.533 3.473

23/FA FALL 2023

UPPER DIV JD BILLING CLASS	150	12	IP	Z			
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0.0 0.0 0.00 0.000 3.473

CUMULATIVE TOTALS

Cred. Att.	Cred. Cpt.	GPA Cred.	Grade Pts.	GPA
29.00	63.00	15.00	52.10	3.473

EXAMENSBEVIS

DEGREE CERTIFICATE

Ekonomie kandidatexamen

Huvudområde: Företagsekonomi

Degree of Bachelor of Science in Business and Economics

Main Field of Study: Business Administration

Paula Holmberg

19951001-8865

Stockholm den 7 september 2021

Stockholm 7 September 2021



Anna Malmberg Lewis

Examenshandläggare

Senior Administrative Officer



**Stockholms
universitet**

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Paula Holmberg | 19951001-8865 | sida/page 1 (3)

Paula Holmberg

Namn/Name

19951001-8865

Personnummer/ Personal identity number

Kurs Course	Högskolepoäng Credits	Betyg Grade	Datum Date
Business and Academic Communication 1 ¹ <i>Business and Academic Communication 1</i>	7,5	Utmärkt ² <i>Excellent</i>	2016-11-14
Företagsekonomi GR (A), Personal och ekonomi ³ <i>Business Administration BA (A), Human Resource Costing and Accounting</i>	7,5	Bra ⁴ <i>Good</i>	2018-06-07
Brand Management C ⁵ <i>Brand Management C</i>	7,5	Bra ⁶ <i>Good</i>	2020-01-17
Nationalekonomi I - makroekonomi ⁷ <i>Economics I - Macroeconomics</i>	15,0	B ⁸ <i>B</i>	2020-05-26
Internationell key account management ⁷ <i>International Key Account Management</i>	7,5	B ⁸ <i>B</i>	2020-06-09
Förhandling i internationell försäljning ⁷ <i>Negotiation in International Sales</i>	7,5	A ⁸ <i>A</i>	2020-06-17
Diversity Management ⁹ <i>Diversity Management</i>	7,5	Väl godkänd ¹⁰ <i>Pass with distinction</i>	2020-08-16
Nationalekonomi - Mikroekonomi med tillämpningar ⁷ <i>Economics - Micro Economics Theory and Applications</i>	15,0	D ⁸ <i>D</i>	2020-08-22
Internetbaserad juridisk introduktionskurs ¹¹ <i>Internet Based Introduction to Law with Multimedia Lectures</i>	15,0	Väl godkänd ¹⁰ <i>Pass with distinction</i>	2021-03-21
Finansiering II <i>Finance II</i>	7,5	Bra ¹² <i>Good</i>	2021-05-28
Examensarbete i företagsekonomi för kandidatexamen <i>Bachelor's Degree Thesis in Business Administration</i>	15,0	Utmärkt ¹² <i>Excellent</i>	2021-06-03
Finansiering I <i>Finance I</i>	7,5	Utmärkt ¹² <i>Excellent</i>	2021-06-04
Forskningsmetoder i företagsekonomi och organisationsstudier ¹³ <i>Research Methods in Business and Organisation Studies</i>	7,5	-	2021-08-30 ¹⁴
Frönter i managementforskning ¹³ <i>Frontiers in Management Research</i>	7,5	-	2021-08-30 ¹⁴
Marknadsföring I ¹⁵ <i>Marketing I</i>	7,5	-	2021-08-30 ¹⁴
Marknadsföring II ¹⁶ <i>Marketing II</i>	7,5	-	2021-08-30 ¹⁴
Organisation I ¹⁵ <i>Organization I</i>	7,5	-	2021-08-30 ¹⁴
Organisation II ¹⁶ <i>Organization II</i>	7,5	-	2021-08-30 ¹⁴
Redovisning I ¹⁵ <i>Accounting I</i>	7,5	-	2021-08-30 ¹⁴
Redovisning II ¹⁵ <i>Accounting II</i>	7,5	-	2021-08-30 ¹⁴

Examen har avlagts i enlighet med högskoleförordningen (SFS 1993:100). Ekonomie kandidatexamen är en examen på grundnivå och omfattar 180 högskolepoäng. Ett års heltidsstudier om 40 veckor motsvarar 60 högskolepoäng.

The Degree has been awarded in accordance with the Higher Education Ordinance (SFS No: 1993:100). A Degree of Bachelor of Science in Business and Economics is a first cycle qualification and comprises 180 credits. A 40-week academic year, full-time study, corresponds to 60 credits.

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Paula Holmberg | 19951001-8865 | sida/page 2 (3)

Noter/Notes

- 1 Kurs läst vid Högskolan i Jönköping
Course taken at Jönköping University, Sweden
- 2 Betygsskala: Utmärkt (A), Mycket bra (B), Bra (C), Tillfredsställande (D), Tillräckligt (E)
Grading scale: Excellent (A), Very good (B), Good (C), Satisfactory (D), Sufficient (E)
- 3 Kurs läst vid Mittuniversitetet
Course taken at Mid Sweden University, Sweden
- 4 Betygsskala: Framstående (A), Mycket bra (B), Bra (C), Tillfredsställande (D), Tillräcklig (E)
Grading scale: Excellent (A), Very good (B), Good (C), Satisfactory (D), Sufficient (E)
- 5 Kurs läst vid Högskolan i Gävle
Course taken at University of Gävle, Sweden
- 6 Betygsskala: Utmärkt (A), Mycket bra (B), Bra (C), Tillfredsställande (D), Tillräckligt (E)
Grading scale: Excellent (A), Very good (B), Good (C), Satisfactory (D), Sufficient (E)
- 7 Kurs läst vid Linnéuniversitetet
Course taken at Linnaeus University, Sweden
- 8 Betygsskala: A (A), B (B), C (C), D (D), E (E)
Grading scale: A (A), B (B), C (C), D (D), E (E)
- 9 Kurs läst vid Högskolan Kristianstad
Course taken at Kristianstad University, Sweden
- 10 Betygsskala: Väl godkänd (VG), Godkänd (G)
Grading scale: Pass with distinction (VG), Pass (G)
- 11 Kurs läst vid Lunds universitet
Course taken at Lund University, Sweden
- 12 Betygsskala: Utmärkt (A), Mycket bra (B), Bra (C), Tillfredsställande (D), Tillräckligt (E)
Grading scale: Excellent (A), Very good (B), Good (C), Satisfactory (D), Sufficient (E)
- 13 Tillgodoräknad kurs. Originalbetyg utfärdat vid Linnéuniversitetet. Inget betyg anges i samband med tillgodoräknande
Transferred course. Original transcript of records issued from Linnaeus University, Sweden. Transferred credits are never graded
- 14 Beslutsdatum
Date of decision
- 15 Tillgodoräknad kurs. Originalbetyg utfärdat vid Högskolan i Jönköping. Inget betyg anges i samband med tillgodoräknande
Transferred course. Original transcript of records issued from Jönköping University, Sweden. Transferred credits are never graded
- 16 Tillgodoräknad kurs. Originalbetyg utfärdat vid Högskolan i Gävle. Inget betyg anges i samband med tillgodoräknande
Transferred course. Original transcript of records issued from University of Gävle, Sweden. Transferred credits are never graded

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Paula Holmberg | 19951001-8865 | sida/page 3 (3)



DIPLOMA SUPPLEMENT

This Diploma Supplement model was developed by the European Commission, Council of Europe and UNESCO/CEPES. The purpose of the supplement is to provide sufficient independent data to improve the international “transparency” and fair academic and professional recognition of qualifications (diplomas, degrees, certificates etc.). It is designed to provide a description of the nature, level, context, content and status of the studies that were pursued and successfully completed by the individual named on the original qualification to which this supplement is appended. It should be free from any value judgements, equivalence statements or suggestions about recognition. Information in all eight sections should be provided. Where information is not provided, an explanation should give the reason why.

1. Information identifying the holder of the qualification

- 1.1 Family name(s)** Holmberg
- 1.2 Given name(s)** Paula
- 1.3 Date of birth (day/month/year)** 1 October 1995
- 1.4 Student identification number or code (if available)** 19951001-8865

2. Information identifying the qualification

- 2.1 Name of qualification and (if applicable) title conferred (in original language)**
Ekonomie kandidatexamen (Degree of Bachelor of Science in Business and Economics)
- 2.2 Main field(s) of study for the qualification**
Business Administration
- 2.3 Name and status of awarding institution (in original language)**
Stockholms universitet (Stockholm University).
State higher education institution with status of university.
- 2.4 Name and status of institution (if different from 2.3) administering studies (in original language)**
Not applicable.
- 2.5 Language(s) of instruction/examination**
Swedish and English.

3. Information on the level of the qualification

- 3.1 Level of qualification**
Grundnivå/First-cycle QF-EHEA SeQF 6/EQF 6. For information on the Swedish higher education system, see section 8.
- 3.2 Official length of programme**
180 högskolepoäng (credits)/180 ECTS. Duration of 3 years of full-time studies. A normal 40-week academic year corresponds to 60 credits (högskolepoäng). One credit corresponds to 1 ECTS credit.
- 3.3 Access requirement(s)**
There are general and (additional) specific entry requirements that should be fulfilled for access to higher education within all cycles.
The general entry requirements for first-cycle studies are the same for all higher education. General entry requirements can be attained by completing an upper-secondary school programme, via adult education at upper-secondary school level or the applicants achieving a comparable level of learning outcomes through other education, practical experience or other circumstances.

4. Information on the contents and results gained

- 4.1 Mode of study**
Full-time equivalent.
- 4.2 Programme requirements**
The Swedish Higher Education Act takes account of 1) courses and study programmes based on scholarship or artistic practice and on proven experience, and 2) research and artistic research as well as development work. Reference to research below also applies to artistic research.

According to the Swedish Higher Education Act, first-cycle courses and study programmes shall develop the students' ability to make independent and critical assessments; ability to identify, formulate and solve problems autonomously; and the preparedness to deal with changes in working life. In addition to knowledge and skills in their field of study, students shall develop the ability to: gather and interpret information at a scholarly level; stay abreast of the development of knowledge; and communicate their knowledge to others, including those who lack specialist knowledge in their field. (For further information, see The Swedish Higher Education Act and The Higher Education Degree Ordinance: www.uhr.se/en)

4.3 Programme details (e.g. modules or units studied), and the individual grades/marks/credits obtained (if this information is available on an official transcript this should be used here)

A Degree of Bachelor is awarded after the student has completed the courses required to gain 180 credits in a defined specialisation determined by each higher education institution itself, of which 90 credits are for progressively specialised study in the principal field (main field of study) of the programme.

A requirement for the award of a Degree of Bachelor is completion by the student of an independent project (degree project) for at least 15 credits in the main field of study.

Since 1 January 2016, local qualification descriptors are available, adopted by the academic area boards based on a common model. The local qualification descriptors cover general first and second-cycle qualifications. The programme syllabi fill the same function for professional qualifications, and the general syllabi contain the provisions for third-cycle qualifications. For further information, visit www.su.se.

For more information, see Degree Certificate/Official Transcript.

4.4 Grading scheme and, if available, grade distribution guidance

There is no national grading system in Sweden. Higher education institutions may determine which grading system is to be used. For more information, see Degree Certificate/Official Transcript.

4.5 Overall classification of the qualification (in original language)

Not applicable for Swedish qualifications, since no overall grade is awarded for a degree and students are not ranked. For example, Grade Point Average (GPA) and other ranking systems are not used in Sweden.

5. Information on the function of the qualification

5.1 Access to further study

The degree gives access to second-cycle studies (master studies).

5.2 Professional status (if applicable)

The Degree of Bachelor corresponds to the qualification level referred to in point (d) of Article 11 of Directive 2005/36/EC.

6. Additional information

6.1 Additional information

None.

6.2 Further information sources

Stockholm University
SE-106 91 Stockholm
+46 (0)8 162000
www.su.se

The Swedish Council for Higher Education (Universitets- och högskolerådet) has been commissioned to act as the Swedish NARIC and is also part of ENIC. The ENIC-NARIC office provide information on education in Sweden. Please see: <http://www.uhr.se>

For information on Professional Qualifications Directive, Swedish National Assistance Centre for the Recognition of Professional Qualifications (Professional Qualifications Directive 2005/36/EC):
pqinfo@uhr.se

For information on quality assurance, Swedish Higher Education Authority: <http://english.uka.se>

7. Certification of the supplement

7.1 Date 7 September 2021

7.2 Signature



7.3 Capacity Senior Administrative Officer

7.4 Official stamp or seal

The e-signature can be verified through clicking on the signature or the transaction number:

Ad*b S\$")V/-a).a&/S*).J0((-v CBJCHBCAABAAw'24"\$Vf)NYL'xp(CdIfdDL*ua3r2&

8. Information on the national higher education system

See attached information on the The Swedish higher education system.

The Swedish higher education system

According to legislation after 1 January 2007.

The following description is approved by the Swedish Council for Higher Education.

The Swedish higher education system is based on the Swedish Higher Education Act (SFS 1992:1434) and the 1 January 2007 amendments to the Higher Education Ordinance (1993:100). The following description is a short summary based on the legislation regulating the Swedish higher education system.

Qualifications from all higher education institutions (universities, university colleges and independent higher education providers) that are recognized by the Government are of equal official value. The same legislation governs all state higher education institutions. All Swedish degrees are issued in accordance with the same degree ordinances.

Quality assurance

The Swedish Higher Education Authority has been responsible for the quality assurance system for all higher education since 1 January 2013. For more information, please visit www.uka.se. Evaluation reports are available to the public.

National Qualification Frameworks

The Swedish Higher Education Act and the Higher Education Ordinance have been amended in accordance with the agreements reached as part of the Bologna Process, including the Qualifications Frameworks in the European Higher Education Area (QF-EHEA). Legislation for a three-cycle structure of higher education started to apply in July 2007, and is now the only one in use in all Swedish higher education. Transitional provisions apply to courses and programmes that started prior to this. For more information, please visit www.uhr.se/en or enic-naric.net.

In 2015, the Swedish Government decided on a national qualifications framework (SeQF), based on the European Qualifications Framework for Lifelong Learning (EQF). The SeQF has eight levels that are in accordance with the EQF

levels. Higher education qualifications are at levels six to eight. For more information, please visit www.seqf.se.

Credit system

Sweden has a system of credits (högskolepoäng); a normal 40-week academic year corresponds to 60 credits. The system is compatible with ECTS credits.

Grading system

There is no national grading system in Sweden. Higher education institutions may determine which grading system is to be used. No overall grade is awarded for a degree and students are not ranked. For example, Grade Point Average (GPA) and other ranking systems are not used in Sweden.

Access and admission

There are general and specific entry requirements for access to higher education within all cycles. The specific entry requirements vary according to the field of higher education and/or should be essential for students to be able to benefit from the course or study programme. The number of places is limited on all study programmes and courses.

The general entry requirements for first-cycle studies are the same for all higher education. General entry requirements can be attained by completing an upper-secondary school programme, via adult education at upper-secondary school level or the applicants achieving a comparable level of learning outcomes through other education, practical experience or other circumstances.

The general entry requirements for second-cycle studies are a first-cycle qualification of at least 180 credits, or a corresponding foreign qualification. An applicant may also be accepted on the basis of a comparable level of learning outcomes obtained through other education, practical experience or other circumstances. **p**

The general entry requirements for third-cycle studies are a second-cycle qualification, or completed courses worth at least 240 credits (of which 60 credits are at second-cycle level) or the equivalent level of knowledge acquired in Sweden or abroad. Furthermore, for entry to third-cycle studies, the applicant must be deemed able to benefit from the education.

Qualifications

All courses, study programmes and qualifications are on one of three levels: first-, second- or third-cycle. In the Higher Education Ordinance, the Government has determined which qualifications may be awarded, as well as their scope, requirements and intended learning outcomes. There are three categories of qualifications: general; the fine, applied and performing arts; and professional qualifications. For some more information, please see below.

General qualifications

First-cycle (SeQF/EQF 6)

Högskoleexamen (Higher Education Diploma) requires 120 credits and an independent project (degree project).

Kandidatexamen (Degree of Bachelor) requires 180 credits. At least 90 credits must be completed in the main field of study, including an independent project (degree project) worth 15 credits.

Second-cycle (SeQF/EQF 7)

Magisterexamen (Degree of Master (60 credits)) requires 60 credits. At least 30 credits must be completed in the main field of study, including an independent project (degree project) worth 15 credits. In addition, the student must normally hold a kandidatexamen, or a professional degree of at least 180 credits, or an equivalent foreign degree.

Masterexamen (Degree of Master (120 credits)) requires 120 credits. At least 60 credits must be completed in the main field of study, including an independent project (degree project) worth at least 30 credits. In addition, the student must normally hold a kandidatexamen, or a professional degree of at least 180 credits or an equivalent foreign degree.

Third-cycle (SeQF/EQF 8)

Licentiatexamen (Degree of Licentiate) requires at least 120 credits, including a research thesis worth at least 60 credits. A higher education institution may decide that a licentiatexamen can be awarded as a separate qualification or as a step on the way to doktorsexamen (see below).

Doktorsexamen (Degree of Doctor) requires 240 credits, including a research thesis (doctoral thesis) worth at least 120 credits. The thesis must be presented at a public defence.

Qualifications in the fine, applied and performing arts

Qualifications in the fine, applied and performing arts are awarded at all three cycles and corresponding SeQF levels. At first-cycle level: konstnärlig högskoleexamen (Higher Education Diploma) and konstnärlig kandidatexamen (Degree of Bachelor of Fine Arts). At second-cycle level: konstnärlig magisterexamen (Degree of Master of Fine Arts (60 credits)) and konstnärlig masterexamen (Degree of Master of Fine Arts (120 credits)). Two third-cycle qualifications are awarded: konstnärlig licentiatexamen (Degree of Licentiate) and konstnärlig doktorsexamen (Degree of Doctor).

Professional qualifications

Professional qualifications are offered at either first- or second-cycle level and corresponding SeQF levels. These qualifications may stretch over two cycles and are awarded in areas that include engineering, health care, agriculture, law, and education. Professional qualifications are regulated by national legislation and are considered regulated education subject to the Professional Qualifications Directive 2005/36/EC.

Titles of qualifications

Translations into English of all titles of qualifications are regulated at the national level. Higher education institutions may decide to add a prefix to a qualification title e.g. filosofie kandidatexamen or medicine doktorsexamen or/and add a major field of studies e.g. civilingenjörsexamen i maskinteknik.



ANDREW Y.S. CHENG
JUDGE

Superior Court of California
County of San Francisco

June 12, 2023

Dear Judge,

It is my pleasure to write in support of Victoria Holmberg's application for a position in your chambers.

Victoria worked with me this past spring in the complex litigation department of San Francisco Superior Court. We carry a load of about 300 complex cases covering a broad range of issues, including antitrust, securities, class actions, and mass torts. Many of our cases have a federal companion case.

During her three months under my supervision, Victoria worked on several complex cases and produced thorough and well-written memoranda and draft orders. She learns new areas of law quickly and works well under deadlines and pressure. Her efforts greatly contributed to the analysis of our cases.

Beyond her legal research and writing skills, Victoria actively engaged in discussions after hearings and advocated for her positions in a respectful, yet firm way. On a personal level, she is a very warm and engaging person, who has seamlessly adapted to three cultures (Swedish, Thai, and American). She worked well with staff and our two legal writing attorneys, who also think highly of her abilities and work product.

In short, I have every confidence that she will make an excellent law clerk or extern, especially after three months with us and another three months at the Ninth Circuit Court of Appeals.



ANDREW Y.S. CHENG
JUDGE

Superior Court of California
County of San Francisco

Please do not hesitate to call me should you have other questions. My chambers number is: (415) 551-5877.

Sincerely,

A handwritten signature in blue ink, reading "Andrew Y.S. Cheng". The signature is fluid and cursive, with the first name "Andrew" written in a larger, more prominent script.

Andrew Y.S. Cheng
Judge of the Superior Court



Jamie Dolkas

Law Professor
SVP of Strategy and Research
Center for WorkLife Law, UC Law SF
dolkasj@uchastings.edu

Letter of Recommendation on Behalf of Victoria Holmberg

June 27, 2023

To Whom It May Concern,

I am writing to wholeheartedly recommend Victoria for the position of law clerk. I was Victoria's professor in the Leadership Skills for Lawyers course, which focuses on crucial professional tools through written assignments, class discussions, and presentations. Victoria approached each class genuinely eager to learn, and actively participated in every discussion, fostering a collaborative environment.

Victoria demonstrated exceptional leadership skills during the course, both as an active participant and a respectful listener, contributing to a rich dialogue in our classroom. Victoria's ability to incorporate feedback and constructively engage with her peers showcases her collaborative spirit and exemplifies her growth mindset and desire for continuous improvement. The class involved substantial peer-led feedback and Victoria was always generous and thoughtful in troubleshooting and providing feedback to her peers.

One aspect that stood out about Victoria was her outstanding organizational skills and professionalism. She demonstrated attention to detail, consistently submitting assignments of exceptional quality that were well-researched and thoughtfully written. Based on Victoria's exceptional performance, her final grade in the course was an A. Beyond her academic achievements, Victoria possesses a strong character and passion for the legal profession.

In conclusion, I highly recommend Victoria and firmly believe her commitment to excellence will make a significant contribution as a law clerk. Please do not hesitate to reach out if you have any further questions.

Best Regards,

Ms. Jamie Dolkas
Professor of Law
UC Law SF
200 McAllister St.
San Francisco, CA 94102

**VICTORIA HOLMBERG
WRITING SAMPLE**

This writing sample is a five-page draft order from two Motions To Seal. The analysis was used by Judge Cheng's clerk for six additional motions to seal in the same case, which were used in a longer order. The order was signed and issued by Judge Cheng.

I was given a page limit for the assignment, and I did not receive outside help, edits or feedback. The text has been anonymized and approved for use.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 613

PLAINTIFF,

Plaintiff,

v.

DEFENDANT MPC, INC.,

Defendant.

DEFENDANT MPC, INC.,

Cross-Complainant,

v.

PLAINTIFF,

Cross-Defendants.

Case No. CGC-XX-XXXXXX

ORDER DENYING DEFENDANT'S
MOTION TO SEAL

INTRODUCTION

Defendant DEFENDANT MPC, Inc. ("Defendant") filed a motion to seal evidence related to Plaintiff PLAINTIFF's ("Plaintiff") motion to compel answers at a deposition and further responses to requests for production and Defendant's opposition thereto. Defendant's motion is unopposed and may be determined without a hearing as requested by the parties. Having reviewed and considered the

- 1 -

Plaintiff v. Defendant MPC, Inc. CGC-XX-XXXXXX Order Denying Defendant DEFENDANT MPC, INC.'s Motion to Seal Related to Plaintiff's MTC and Defendant's Opposition

arguments, pleadings, and written submissions of all parties, the Court finds that the matter may be decided without oral argument and **DENIES** Defendant's motion to seal.

LEGAL STANDARD

The First Amendment provides a right of access to ordinary civil trials and proceedings. (*NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.* (1999) 20 Cal.4th 1178, 1212.) In *NBC Subsidiary*, the California Supreme Court has observed that numerous reviewing courts have found a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication. (*Id.* at pp. 1208–09 & n. 25.) Since *NBC Subsidiary*, California courts have regularly employed a constitutional analysis in resolving disputes over public access to court documents. (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 485.) The First Amendment principles are embodied in the sealed records rules, rules 2.550 and 2.551 of the California Rules of Court. (*Id.* at p. 486.)

A party moving to seal a record must file a declaration “containing facts sufficient to justify the sealing” request. (Cal. Rules of Court, rule 2.551(b)(1)). The Court may order a record sealed only upon making express findings that (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest. (*Overstock.com, supra*, 231 Cal.App.4th at p. 487; see also Cal. Rules of Court, rule 2.550(d).)

“In its order, the court must identify the facts supporting its issuance.” (*Ibid.*; *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, 1576 [sealing order requires more than the “rote recitation of the listed criteria” and “particular facts [are] necessary to satisfy the constitutional standards for sealing court records”]; *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 301 [A declaration supporting a motion to seal should be specific, not conclusory, as to the facts supporting the overriding interest]; *H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894–99 [describing evidentiary submissions that were

insufficient to support sealing, stating, in part, that “plaintiff has never identified any *specific* facts disclosure of which would harm any identified interest.”].) In light of the specificity of the findings a court must make, a party’s supporting declaration must also be specific enough to allow such findings to be made. (Cal. Rules of Court, Rule 2.550(d).)

Unless a court can and does make the specific factual findings above, a record cannot be sealed. (Cal. Rules of Court, rule 2.550(d); *Overstock.com*, *supra*, 231 Cal.App.4th at p. 487.) This is true irrespective of whether the records at issue have been designated as confidential pursuant to a stipulated protective order. (Cal. Rules of Court, rule 2.551(a) [“The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties.”].)

DISCUSSION AND ANALYSIS

I. Sealing Requests.

Defendant seeks to file the following under seal:

- Plaintiff’s Memorandum of Points and Authorities in Support of Motion to Compel at 2:9-11; 2:14-45; 3:1-5; 3:8-10; 3:12-15; 3:18-21; 4:18; 6:23-26; 7:2-4; 7:11-14; 7:23; 7:25; 8:5-6; 8:16; 8:25; 8:27; 9:14-17; and 9:20-23;
- Plaintiff’s Separate Statement in Support of Motion to Compel at 1:19-3:12; 4:3-7:4; and 7:11-9:14;
- Defendant and Cross-Complainant’s Opposition to Plaintiff’s Motion to Compel Answers at 3:14-21; 4:11-15; 5:5-7; 5:16-23; 7:27-8:4; 8:6-7; 8:10-13; 8:18-21; 10:12- 18; and 11:16-12:5;
- Defendant and Cross-Complainant’s Response to Plaintiff’s Separate Statement in Support of Motion to Compel, at 2:18-4:14; 4:22-23; 4:26-5:14; 7:19-10:18; 11:7; 11:9-13; 11:15-16; 11:18-27; 12:2-3; 12:5-6; 12:8-12; 12:14-18; 12:20-21; 12:23-24; 12:27-13:6; 13:7-8; 13:11-17; 13:18; 13:21-26; 14:1-2; 14:4-9; 14:11-12; 14:15-22; 14:24-25; 15:1-20; 15:23-16:2; 16:5-11; 16:15-19; 16:23-24; 17:1-2; 17:4; 17:8-10; 17:13-18; 17:20-27; 18:2-7; 18:10-16; 18:18-24; 18:26-27; 19:2;

19:6-9; 19:16-21:21; 21:24-22:1; and

- Exhibit B to the Declaration of Ms. Jane Doe in Support of Defendant and Cross-Complainant's Opposition to Plaintiff's Motion to Compel Answers.

II. Existence of an Overriding Interest.

Defendant's arguments in support of their motion to seal are conclusory, lack sufficient support and is devoid of evidence showing confidentiality, privacy and/or trade secret. Defendant has not supported what harm would result in leaving the documents unsealed or that the sealing is narrowly tailored.

It is insufficient to generically recite that Defendant seeks to seal private information and will be irreparable harmed, particularly without addressing efforts to maintain the confidentiality of the specific information sought to be sealed. The Court finds these arguments unsupported with sufficient evidence but merely conclusory and unspecific statements.

The declaration by Mr. Smith is insufficient as it is conclusory and lacks support for the irreparable harm alleged. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 301 [A declaration supporting a motion to seal should be specific, not conclusory, as to the facts supporting the overriding interest]; *H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894–99 [describing evidentiary submissions that were insufficient to support sealing, stating, in part, that “plaintiff has never identified any *specific* facts disclosure of which would harm any identified interest.”].) The declaration by Mr. Johnson, attorney for Defendant, is insufficient as he lacks personal knowledge to provide evidence in support of a sealing request based on confidentiality, privacy and/or trade secrets. (*Ibid.*)

The Court finds Defendant's evidence in support of these overriding interests insufficient, particularly given the overbroad sealing request.

III. Protective Order in Itself is Insufficient.

The Court is unpersuaded that the existence of a protective order and the designation of certain

1 portions of Mr. Smith's deposition testimony as "confidential, private and trade secret information"
2 supports sealing. (See *Overstock.Com, supra*, 231 Cal.App.4th at 486 ["a court must not permit a record
3 to be filed under seal based solely on the agreement or stipulation of the parties."] [citations and internal
4 quotation marks omitted].)

5 **CONCLUSION**

6 Defendant's request is overbroad, lacks sufficient evidence showing potential harm, and does not
7 present legal or factual analysis to establish that all of the criteria for sealing are satisfied. For the
8 foregoing reasons, the Court **DENIES** Defendant's motion to seal.
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12 IT IS SO ORDERED.
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14 Dated: April 6, 2023

15 _____
16 ANDREW Y.S. CHENG
17 Judge of the Superior Court
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**VICTORIA HOLMBERG
WRITING SAMPLE II**

Given that Your Honor's chambers handles a number of cases involving civil rights matters, I am submitting an additional writing sample on this topic.

This writing sample is a forty-nine-page brief which was written in pairs during Appellate Advocacy class. I wrote the first half, pertaining to the Eighth Amendment argument. I did receive feedback while writing this brief. I also orally presented my argument during the David E. Snodgrass Moot Court Competition.

No. 11-11

**IN THE SUPREME COURT OF THE
UNITED STATES**

DENNIS WAYNE HOPE, ET AL., PETITIONER

V.

TODD HARRIS, ET AL., RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENTS

Oral Argument

Date: November 9, 2022

Round: 1

Eliza Clark

Victoria Holmberg

200 McAllister Street

San Francisco, CA 94102

(415) 555-5555

Attorney for Respondents

QUESTIONS PRESENTED

- I. In the absence of unusual circumstances, can the duration of Administrative Segregation alone trigger an Eighth Amendment violation?
- II. Does a procedural hearing regarding an inmate's Administrative Segregation placement satisfy the Due Process Clause of the Fourteenth Amendment?

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INTRODUCTION

This Court granted Petitioner Dennis Wayne Hope's petition for writ of certiorari to review whether Respondent Warden Todd Harris, et al., violated the Eighth Amendment and the Fourteenth Amendment. J.A. 26, 88. The United States Court of Appeals for the Fifth Circuit correctly affirmed the dismissal of Hope's cruel and unusual punishment claim under the Eighth Amendment, as Hope failed to state a claim against prison officials which successfully challenged the conditions of administrative segregation, showing a deliberate indifference to Hope's health and safety. *Hope v. Harris*, 861 Fed. Appx. 571, 585 (5th Cir. 2021). Further, the Fifth Circuit correctly affirmed the dismissal of Hope's procedural due process claim under the Fourteenth Amendment because while Hope established a liberty interest, the procedural mechanisms he is provided are constitutionally sufficient, and the state's interest in ensuring the safety of the public, prison personnel, and prison population outweigh Hope's interest. *Hope v. Harris*, 861 Fed. Appx. at 580-81. Thus, this Court should uphold the Fifth Circuit's decision on both issues in favor of the Respondent.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Hope v. Harris*, 861 Fed. Appx. 571 (5th Cir. 2021).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit upon granting petition for writ of certiorari. 28 U.S.C. § 1254(1). The Eighth and Fourteenth Amendments of the United States Constitution violation claims commenced under 42 U.S.C. § 1983.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*, including Eighth Amendment claims of cruel and unusual punishment and Due Process Claims under the Fourteenth Amendment. *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (holding that “identification of the liberty interests that are protected by the Due Process Clause is a question of federal constitutional law that we review *de novo*”); *see also United States v. Farrar*, 876 F.3d 702, 714 (5th Cir. 2017) (holding that “Eighth Amendment challenges are reviewed *de novo*”).

STATEMENT OF THE CASE

I. Statement of Facts

Petitioner, Dennis Wayne Hope (“Hope”), is an inmate confined in the Security Housing Unit (“SHU”) or Administrative Segregation (“Ad. Seg.”) at the Polunsky Unit of the Texas Department of Criminal Justice - Institutional Division. J.A. 30. Hope has an extensive criminal record, including five aggravated robberies with a deadly weapon in 1990 and 1998 and two prison escapes in 1990 and 1994. J.A. 28.

A. Conditions of Administrative Segregation

Hope alleges that he is housed in a fifty-four square foot cell twenty-three hours per day for 191 days a year and twenty-four hours per day the other 174 days of the year. J.A. 32. Hope later claims he is permitted recreational time outside of his cell for two hours a day for five days a week unless there is inclement weather or a staff shortage. J.A. 33. He is served food every day on a tray through a slot to be enjoyed privately. J.A. 32. Compared to inmates in the general population (“G.P.”), Hope alleges that he is served smaller portions and fewer condiments on unsanitized trays, and that the food is cold. J.A. 32. He alleges that he has contracted food poisoning more than twelve times over the last twenty-three years. J.A. 32.

Hope is released from his cell on average four times a day to participate in recreational activities and to shower. J.A. 32. When released from his cell, a strip search is conducted and he claims he must be handcuffed behind his back, a process he alleges causes pain. J.A. 32. Searches are not reserved only for inmates in Ad. Seg., inmates in G.P. are also subjected to daily searches. J.A. 32. Hope is not allowed to be handcuffed in the front, per the order of Warden Harris and Major Rehse, whom Hope asserts are aware of his pain. J.A. 32. Refusal to comply with this procedure could result in disciplinary measures or pepper spray. J.A. 32.

The prisoners in the G.P. are allowed to possess more property than prisoners in Ad. Seg. J.A. 33. Hope is allowed to have two cubic feet of property and prohibited from possessing a pencil sharpener, elastic clothing, or a razor. J.A. 33. Hope's primary source of human contact is with the officers and medical staff. J.A. 33. Approved family visits require a plexiglass partition and the use of a phone, as contact visits are not permitted. J.A. 33. Although Hope does not have access to a television, he is permitted to use a telephone in emergency situations when approved by the prison authorities. J.A. 33. Hope is allowed to call ten people on his approved visitor list for up to five minutes, averaging up to fifteen dollars. J.A. 33. Hope has chosen to make one phone call during the entire duration of his incarceration. J.A. 33. Hope alleges that inmates in the G.P. pay less to use the phone, are allowed to socialize, work, live in dormitories, and participate in recreational opportunities. J.A. 33. Hope alleges prisoners in the G.P. endure less hardship and have more human contact and physical activity than the inmates in Ad. Seg. J.A. 33.

In Ad. Seg., inmates beat and bang on doors, holler, and argue. J.A. 34. This noise makes it hard for officers to hear, and officers commonly use the tray slot to get prisoners'

attention. J.A. 34. Hope asserts that the noise affects his sleep quality and claims it contributes to his anxiety and depression. J.A. 34.

Hope alleges that Major Rehse and prison officials use tear gas, pepper spray, and pepper balls. J.A. 34. Hope has been exposed to tear gas and pepper spray over the course of two decades, and in the last two years, he has been exposed at least ten times. J.A. 34. He claims that on May 31, 2017, the prisoners “made [the officers] gas them” and Major Rehse allowed the gas to linger throughout the prison. J.A. 34. Further, he claims that on July 28, 2017, Major Rehse used pepper spray to quiet the inmates and that Major Rehse waited to turn on the exhaust fan to dispel the spray. J.A. 34.

Inmates in the G.P. are placed into lockdown, ranging from fourteen to thirty days, twice a year to be searched and their shared cells are subject to random searches and inspections every other day. J.A. 34-35. Compared to inmates in the G.P., inmates in Ad. Seg. are placed in lockdown as little as two additional times per year. J.A. 34. During these lockdowns, Hope is served two different sandwiches for each of his daily meals. J.A. 35. Hope claims that this temporary diet inflicts an unnecessary calorie deficiency, weight loss, and constipation. J.A. 35.

Hope uses walkways and showers which are cleaned by other inmates serving in the “Support Service.” J.A. 35. This service is not provided during the temporary lockdowns. J.A. 35. Although the showers are available to Hope three times a week, he has chosen not to use the showers, claiming the facilities have mold and mildew. J.A. 35. Furthermore, Hope asserts he is at risk for a skin rash or “Staph infection” even though Hope chooses to shower privately in his own cell. J.A. 35.

Hope is provided with the opportunity to do legal research and he can order three legal cases, three times a week from the law library. J.A. 35. He is prevented from checking out

books or inquiring with other inmates about the law. J.A. 35. Hope claims that Warden Harris enforces this restriction to hinder inmates' access to the court. J.A. 35.

During a search of Hope's cell on February 22, 2012, a typewriter was found and confiscated. J.A. 35. Hope alleges he used this typewriter to file grievances and write letters to officials, including to outside advocates to request they contact the State Classification Committee ("SCC") about his placement in the Ad. Seg. unit. J.A. 35. The search team returned fifteen minutes after Hope was returned to his cell, whereupon a ten-inch screwdriver in a red mesh bag was found near Hope's toilet. J.A. 36. When Hope requested a copy of the video recording to determine where the screwdriver came from, he was pepper sprayed, handcuffed, and left nude and without items to clean off the pepper spray for eight days. J.A. 36. Hope did receive food after forty-eight hours. J.A. 36. He was charged with possession of a weapon for the screwdriver, however, a subsequent investigation revealed that the serial number on the screwdriver connected it to the prison search team. J.A. 36. Subsequently, prison officials began moving Hope from cell to cell. J.A. 36. Hope alleges he is moved weekly and has changed cells more than 263 times. J.A. 36. He alleges this practice was designed to harass and retaliate against him and does not serve a penological purpose. J.A. 36.

Ad. Seg. cells are not normally cleaned prior to Hope moving into them, and despite filing grievances, Hope claims he is not provided with cleaning supplies. J.A. 36. He alleges that sometimes the cells are dirty with feces and urine and that there are no lights in the cells. J.A. 36. Hope alleges that on December 21, 2017, black mold covered eighty percent of a cell wall in cell number 12-EA-11, wherein he remained for thirteen days and developed a cough. J.A. 36. He asserts that Major Rehse knew of the condition of the cell and did not relocate him;

but, he concedes that Assistant Warden Jefferson approved his transfer upon seeing the cell. J.A. 37.

Per prison policies, inmates in Ad. Seg. are escorted by two officers when they leave their cell including for medical appointments. J.A. 37. He alleges he is not permitted private, one-on-one consultations with healthcare providers and that some of his appointments have been delayed due to staff shortages. J.A. 37. On one occasion, Hope alleges he had to wait sixty days to see a provider regarding refilling medication. J.A. 37. In the case of a staff shortage, “cell-side” visits are conducted in which the inmate receives medical and mental health treatment directly at their cell. J.A. 37. Hope contends that the defendants have long worked together to subject him to inhumane conditions. J.A. 43.

Citing chronic back and knee pain from living in Ad. Seg., Hope asserts that he prefers to sleep on his steel bunk instead of his mattress. J.A. 37. However, Hope was placed in Ad. Seg. over twenty-three years ago and is now experiencing ailments in his fifties. J.A. 30, 37. He claims that he suffers from anxiety, depression, hallucinations, and insomnia due to his weekly cell changes and adjusting to new voices and noises. J.A. 38, 43. Hope contends that he has seen fellow prisoners harm themselves and some commit suicide while living in Ad. Seg. and that his requests for mental health treatment have been denied. J.A. 38.

B. Administrative Segregation Hearings

The Administrative Segregation Committee (“ASC”) conducts reviews every thirty days to determine whether an inmate can be released from Ad. Seg. to the G.P. J.A. 38. Hope alleges that the ASC has no actual authority to release him from Ad. Seg., claiming that the hearings are “a sham ... and perfunctory” because the State Classification Committee (“SCC”) pre-determined he would remain in Ad. Seg. for the next 180 days. J.A. 38. He asserts that the six

subsequent reviews occurring every thirty days are also meaningless considering his continued stay in Ad. Seg. was previously approved. J.A. 38. Hope has attended over forty-eight SCC reviews and at each review, his requests for release from Ad. Seg. to the G.P. have been denied. J.A. 38-40. He claims that the SCC reviews do not consider his “current attitude or behavior,” but depend on his prison escape, “an incident that will never change from over 23 years ago.” J.A. 38-39. Further, he alleges that each SCC member has failed to follow classification policies and to use fair procedures or relevant standards when reviewing his requests. J.A. 40.

On June 24, 2016, Hope appeared before a new SCC member, Melissa Benet, and provided written and oral statements to supplement her review of his file and request to be relocated. J.A. 39. Hope alleges she said she “saw no reason not to release him” and informed him that he would be granted release to a transitional program. J.A. 39. He claims that Benet retained his paperwork following the review and that when he received a copy of the review record in the mail nearly three weeks later, it stated that the committee ordered him to remain in Ad. Seg., despite Benet’s informal verbal remarks at the review. J.A. 39.

At a later SCC hearing on December 3, 2016, Hope asked Benet why he was not released from Ad. Seg. despite her verbal conclusion at his previous hearing to which she allegedly responded, stating that she did not have authority to release him as he is deemed a “high profile” and that it was “not [her] call” to approve his transfer. J.A. 39. He asserts that Benet is aware of the mental and physical effects of long-term isolation on an individual, and that his treatment and duration of his Ad. Seg. placement are atypical, and that his challenges are significant in comparison to those of individuals living in the G.P. J.A. 39.

Hope contends that the SCC hearings are meaningless if Benet, despite being a committee member, does not have the authority to approve his transfer. J.A. 39. He claims the

committee and its reviews are not constitutionally sufficient and instead are “perfunctory and a sham.” J.A. 39.

SCC Chairperson Kelly Enloe conducted Hope’s June 8, 2017, SCC review where he again presented a written and oral request to be released to the G.P. J.A. 39. He alleges that Enloe stated that it is “not my decision” whether to move him and that she is reviewing his request because he is on her “list.” J.A. 39. For the past six years, Hope arranged for outside advocates to ask SCC and TDCJ officials what he needed to do to be released to the G.P. J.A. 39. Enloe spoke with the outside advocates at least four times and responded to their questions by quoting policy. J.A. 39. At the end of his June 8th hearing, he claims Enloe stated that “having people contact the SCC isn’t going to do you any good, I’ll let [W]hite know your request.” J.A. 39. Hope claims that Enloe had the authority to release him to the G.P. in 2016 but declined despite knowing of his prolonged placement in Ad Seg., and that she did not justify his continued placement in Ad. Seg. J.A. 28, 40-41.

On December 19, 2017, SCC member Bonnie Fiveash held another review to consider Hope’s placement where he again submitted a written and oral request to be released to the G.P. J.A. 40. He claims Fiveash did not review his paperwork, his file, or consider his request because she did not have the authority or intention to release him. J.A. 40. Fiveash allegedly stated that the “Director” would have the authority to release him and that he would have to request a review by the Director from another person. J.A. 40. He claims Fiveash was aware of the “inherently harmful [mental and physical] effects” of long-term isolation that he suffers from. J.A. 40.

Hope contends that several SCC members approved his request to be released to the G.P. J.A. 40. He cites Steve Rogers’s April 2007 order to place Hope in medium custody and relocate

him to the G.P. J.A. 40. Hope asserts that Vanessa Jones, then SCC Chairperson, removed Rogers's release order from his file and that Rogers's second 2010 order to release Hope to the G.P. was again overruled by Jones. J.A. 40. Hope alleges that SCC members have been instructed not to release him and, by doing so, each SCC member has failed to follow classification policies or use fair procedures when considering his request. J.A. 40. He claims that this atypical treatment and the imposed hardships are "anything but ordinary as it relates to prison life." J.A. 40. Hope claims that the initial cause of placement in Ad. Seg. continues to justify his placement in Ad. Seg. J.A. 41. He asserts that his placement is indefinite, and he is not allowed to have "qualified persons or medical professionals" provide their perspective on his continued placement in Ad. Seg. J.A. 41.

In February 2017, Hope asserts the Deputy Director of Operations, Eschessa, stated he had the authority to consider his removal from Ad. Seg. but declined to review Hope's file. J.A. 41. Hope asserts that Eschessa is responsible for ensuring prisoners are afforded their Due Process by enforcing classifications policies. J.A. 41. Eschessa, Hope contends, is aware of and disregards the physical and mental consequences Hope endures living in Ad. Seg. J.A. 41.

Joni White, Assistant Director of Classifications, was contacted by outside advocates in January 2017 and February 2017 inquiring about Hope's situation. J.A. 41. She responded that his confinement in Ad. Seg. was the result of his 1994 escape and that she does not want to be responsible for the decision to release him to the G.P. J.A. 42. Hope asserts White has directed the SCC members to keep him in Ad. Seg., despite knowing of his physical and mental issues resulting from living there. J.A. 42.

The Security Precautions Designator Committee ("SPDC") reviews the same files as the SCC does to determine if the inmate remains an escape risk or if their security precaution(s) can

be lifted. J.A. 42. In December 2005, Hope's "Escape risk" designator was removed by the SPDC. J.A. 42. After reviewing Hope's file in April 2007, Rogers agreed with the SPDC and likewise removed Hope's designator. J.A. 42. But Rogers's hearing record was removed from Hope's file. J.A. 42. Rogers again ordered Hope's release from Ad. Seg. in January 2010, but this order was overruled in violation of the classification policies. J.A. 42. Hope asserts that White and Enloe are working together to deny him actual reviews or his constitutionally protected Due Process. J.A. 42.

Hope contends that the consequences of his continued placement in Ad. Seg. establish a liberty interest and impact his parole eligibility. J.A. 42, 43. The parole board is unable to consider Hope's highest time-earning class, Level 1 security detention status, correspondence courses, or his lack of disciplinary actions in the last six years. J.A. 42. He asserts that his continued placement in Ad. Seg. conveys to the parole board that he cannot be trusted around staff or other inmates without being handcuffed or escorted. J.A. 43.

SCC decisions and hearings can be appealed by filing a grievance which is then investigated by the unit warden. J.A. 43. However, Hope asserts that the unit warden does not have the authority to overturn an SCC decision, nor do they have a vote during the SCC hearings. J.A. 43. Hope alleges that the appeals process does not qualify as an appeal. J.A. 43. Hope asserts that he is being retaliated against by prison officials because he exercised his constitutional right to file a grievance. J.A. 43.

II. Procedural History

On February 16, 2018, Petitioner filed a complaint against a total of seven prison officials, including Respondents, Todd Harris et al. J.A. 5, 30-31. Petitioner alleged the following claims: (1) a procedural due process claim under the Fourteenth Amendment; and (2)

an Eighth Amendment violation alleging that the conditions and duration of his Ad. Seg. constitute cruel and unusual punishment. J.A. 30-31.

On March 9, 2020, the Magistrate Judge recommended that Respondents' motion to dismiss should be granted and Petitioner's complaint be dismissed with prejudice. J.A. 6-7, 63. Regarding the Eighth Amendment claim, the Magistrate Judge concluded that Hope failed to show that his conditions rise to the level of a constitutional violation, and he failed to satisfy the extremely high standard of showing the Respondents acted with deliberate indifference. J.A. 59. The Magistrate Judge determined that Hope failed to state an Eighth Amendment claim upon which relief could be granted. J.A. 57.

Despite Petitioner's objection to the Magistrate Judge's recommendation, the District Judge accepted the recommendation and issued a final judgment dismissing the case with prejudice on May 5, 2020. J.A. 7, 65, 77-80. Then, on June 3, 2020, Petitioner filed a notice of appeal with the United States Court of Appeals for the Fifth Circuit as to the district court's final judgment adopting the report and recommendations. J.A. 7, 84.

On September 8, 2021, the Fifth Circuit affirmed the dismissal of Hope's procedural due process claim under the Fourteenth Amendment. *Hope v. Harris*, 861 Fed. Appx. 571, 585 (5th Cir. 2021). While Hope established a liberty interest, the court concluded that the procedures attendant upon the liberty deprivation were constitutionally sufficient because the government's interest in ensuring the safety of the public, prison personnel, and prison population outweigh Hope's interest. *Id.* at 580-81. Further, the Fifth Circuit held that Hope is provided constitutionally sufficient process to satisfy the requirements of the Fourteenth Amendment. *Id.* at 581. Regarding the Eighth Amendment violation claim, the Fifth Circuit concluded that Hope stated a claim against Major Rehse for a violation of the Eighth Amendment based on certain

conditions of his confinement and vacated and remanded the judgment to the district court for further proceedings in accordance with the opinion of the United States Court of Appeals for the Fifth Circuit. *Id.* at 582.

On January 28, 2022, Petitioner filed a petition for writ of certiorari with this Court, which was granted on August 22, 2022. J.A. 26, 88.

SUMMARY OF THE ARGUMENT

Respondents respectfully request that this Court affirm the decision of the Fifth Circuit for the United States Court of Appeal because Petitioner has: (1) failed to state a cruel and unusual punishment claim in violation of the Eighth Amendment; and (2) failed to state a Due Process claim under the Fourteenth Amendment.

A cognizable Eighth Amendment claim must satisfy a two-pronged test: (1) that the prison conditions objectively pose a “sufficiently serious” threat to an inmate’s health; and (2) that prison officials acted with subjective “deliberate indifference” to such threat. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Hope failed to satisfy the first prong, a serious threat to his health, as the duration of Hope’s confinement is comparable to similar cases, and he was provided basic human necessities. *See Ruiz v. Texas*, 580 U.S. 1191, 1191 (2017); *see also Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Hope also failed to satisfy the second prong of “deliberate indifference” by proving the defendants’ subjective awareness of a substantial risk of serious harm. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The prison officials were not “deliberately indifferent” as Hope’s duration and conditions in confinement were not abnormal compared to other prisoners in Ad. Seg or in the G.P., and there were not sufficient facts to infer that Hope was at risk of serious harm. *See Ruiz v. Texas*, 580 U.S. 1191. Lastly, the penological interest outweighs the individual rights, as a previous violent behavior can justify an extended

placement in Ad. Seg. *See generally Davis v. Ayala*, 576 U.S. 257, 290 (2015). Here, Hope has tried to escape twice and has a long history of violent offenses. J.A. 57. The public interest in public safety far outweighs Hope interest to not be in Ad. Seg. *See Hewitt v. Helms*, 459 U.S. 460, 473 (1983). This Court should dismiss Hope’s complaint as he has failed to state a claim upon which relief may be granted.

This Court should affirm the dismissal of Hope’s Fourteenth Amendment claim because the state’s interest outweighs that of Hope and the process he is provided satisfies the constitutional requirements of the Fourteenth Amendment. The Fourteenth Amendment’s Due Process Clause provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, §1. Procedural due process claims are considered under a two-prong analysis: (1) “whether there exists a liberty or property interest which has been interfered with by the State;” and (2) “whether the procedures attendant upon that deprivation were constitutionally sufficient.” *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). While Hope has established a private liberty interest in avoiding confinement in Ad. Seg., the process he is provided with is constitutionally sufficient.

For the foregoing reasons, this Court should dismiss the Petitioner’s claims.

ARGUMENT

I. PETITIONER HAS FAILED TO STATE A CLAIM WHICH VIOLATES THE EIGHTH AMENDMENT PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT.

Hope fails to state a claim for cruel and unusual punishment under the Eighth Amendment due to (A) the duration of confinement alone, or (B) in conjunction with other conditions of confinement constitute an obvious and substantial risk of harm, and (C) the penological interest outweighs the private interest.

The Eighth Amendment prohibits the infliction of cruel and unusual punishments. U.S. Const. amend. VIII. An Eighth Amendment violation claim based on confinement needs to satisfy a two-pronged test: first, that the prison conditions objectively pose a “sufficiently serious” threat to his health, and second, that prison officials acted with subjective “deliberate indifference” to such threat. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

First, for a petitioner to prove that prison conditions objectively pose a “sufficiently serious” threat, he must show a deprivation of human needs. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). The prison conditions are proven to be a serious deprivation of human needs when they, alone or in combination, “deprive inmates of the minimal civilized measure of life's necessities.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). However, conditions which are simply restrictive or harsh, but still provide the minimal civilized measure of life's necessities, do not reach a level of serious deprivation, as such conditions “are part of the penalty that criminal offenders pay for their offenses against society.” *Id.* at 347.

Second, for Petitioner to prove the existence of “deliberate indifference,” he must show that the prison officials were: (1) aware of facts from which the inference could be drawn that a substantial risk of serious harm exists; (2) subjectively drew the inference that the risk existed; and (3) disregarded the risk. *Id.* at 836. Deliberate indifference is “more than mere negligence.” *Id.* at 837. Deliberate indifference is a stringent standard to meet. *Connick v. Thompson*, 563 U.S. 51, 70 (2011).

The first, “sufficiently serious,” test will be discussed further in relation to the duration of confinement in section (A). The second, “deliberate indifference” test will be discussed in relation to both the duration and the conditions of the confinement in section (B), as well as in weighing the penological interest against the private interest in section (C) below. The main

focus will be on the first prong of the “deliberate indifference” test, as this prong is mainly at issue and contested, and the two other prongs will not be discussed as in depth, in accordance with the opinion of the Court of Appeals. *Hope v. Harris*, 861 Fed. Appx. 571, 583 (5th Cir. 2021).

Here, Hope has failed to show that the duration of confinement alone pose a “sufficiently serious” threat to his health, as the prison conditions provide a “minimal civilized measure of life's necessities” for Hope. Further, Hope failed to demonstrate that the duration in conjunction with the conditions of his confinement pose a “sufficiently serious” threat which the prison officials were “deliberately indifferent” to by being aware of facts which an inference of substantial risk of serious harm could be draw, as Hope’s circumstances were not abnormal. Lastly, Hope’s individual rights are outweighed by the penological interest in continuing his administrative segregation, given his violent past.

Thus, Hope fails to state a claim for cruel and unusual punishment under the Eighth Amendment because the duration of confinement, either alone, or in conjunction with the conditions of confinement, do not constitute an obvious and substantial risk of harm which outweighs the interests of the public, and this Court should dismiss Hope’s claims.

A. The Duration of Confinement Petitioner Experienced Alone Does Not Constitute a Risk of Serious Harm Which Gives Rise to a Cruel and Unusual Punishment Violating the Eighth Amendment.

This Court should reason that lengthy Ad. Seg. durations could be constitutional. Even if this Court would only consider the duration of Hope’s confinement alone, it still does not give rise to a risk of “serious harm” violating the Eighth Amendment.

The Supreme Court has held that Ad. Seg. is not *per se* unconstitutional. *Hutto v. Finney*, 437 U.S. 678, 686 (1978). The majority of Circuits, including the First, Fourth, Eighth, and

Tenth Circuits, have held that lengthy Ad. Seg. durations could be constitutional, and that duration alone is not enough for a constitutional violation. For example, in *Jackson v. Meachum*, the First Circuit held that a prolonged length or indefinite Ad. Seg. did not constitute a cruel and unusual punishment, even if it resulted in depression. 699 F.2d 578, 584 (1st Cir. 1983). The court reasoned that a long sentence in solitude resulting from violent offenses coupled with the prisoner's capability of escaping justifies prolonged confinement, focusing on administrative burdens and security goals. *Id.* at 585.

Furthermore, in *Sweet v. S.C. Dep't of Corr.*, the Fourth Circuit held that the fact that Ad. Seg. is "prolonged and indefinite" would not in itself be sufficient to constitute a cruel and unusual punishment. 529 F.2d 854, 861 (4th Cir. 1975). Instead, the court reasoned that it is dependent on the purpose for the inmate being committed and the conditions of confinement. *Id.* The conditions will represent the balancing of the prisoner's rights and the "necessary concern and responsibility of the prison authorities for security and order." *Id.* at 860.

Additionally, in *Isby v. Brown*, the Seventh Circuit held that "duration alone" did not support a finding of a constitutional violation of a prisoner's Eighth Amendment rights. 856 F.3d 508, 518 (7th Cir. 2017). Rather, the court adopted a holistic rationale which was dependent on the nature of segregation rising to "the level of extreme deprivation" and the availability of feasible alternatives to the confinement. *Id.* at 522.

Contrary, a minority of Circuits, including the Second and Eleventh Circuits, may consider the duration of an inmate's confinement alone in deciding whether it gives rise to an Eighth Amendment violation. For example, in *Colon v. Howard*, the Second Circuit held that the duration of confinement is a "distinct factor bearing on atypicality and must be carefully considered." 215 F.3d 223, 227 (2d Cir. 2000). However, the Second Circuit has also

emphasized that both the conditions and their duration must be considered in some cases. *See Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir. 1999). Further, when considering the duration of confinement alone, courts may still consider this in light of the offense charged. *See Mukmuk v. Comm'r of Dep't of Corr. Servs.*, 529 F.2d 272, 276 (2d Cir. 1976) (holding that one year in confinement was “constitutionally excessive,” as the inmate merely had a minor offense after taking some brown wrapping paper without authorization). Additionally, in *Magluta v. Samples*, the Eleventh Circuit held that 500 days in Ad. Seg. was a constitutional violation, however, the purpose of confinement was solely punitive, and there was a lack of periodic reviews. 375 F.3d 1269, 1283 (11th Cir. 2004).

Furthermore, the Supreme Court has held that a duration in confinement beyond twenty years were constitutional. *See Ruiz v. Texas*, 580 U.S. 1191, 1191 (2017) (where the Supreme Court denied a petition for certiorari for a prisoner on death row for over twenty-two years, mostly spent in Ad. Seg. without any special penological interest or need).

Here, this Court should reason that lengthy Ad. Seg. durations alone do not violate the Eighth Amendment, pursuant to the majority of circuits above. The reasoning in those Circuits provides for this Court to not focus on the duration alone in a vacuum, but to consider both duration and the conditions of confinement. For instance, conditions which are acceptable, or even similar to the G.P., may justify lengthy confinement durations, which is why it is crucial to take the conditions into consideration when determining if the claim gives rise to an Eighth Amendment violation.

However, even if this Court only considers the duration of Hope’s confinement, it still does not give rise to a cruel and unusual punishment. First, Hope has not fulfilled the first test of a cruel and unusual punishment by proving an objective “sufficiently serious” threat to his

health, as the duration of Hope's confinement is part of "the penalty that criminal offenders pay for their offenses against society." *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Further, this lack of a "sufficiently serious" threat is in accordance with this Court's recent decision in *Ruiz* in denying certiorari for a prisoner with a similar duration in Ad. Seg., and also in accordance with the lower court's decision in dismissing Hope's claims. *See* 580 U.S. 1191, 1191 (2017); *Hope v. Harris*, 861 Fed. Appx. 571, 580 (5th Cir. 2021). Second, Hope has not fulfilled the second test of a cruel and unusual punishment by proving a subjective "deliberate indifference," as no threat of serious harm existed and the prison officials could not reasonably have been aware of it, drawn such an inference, or disregarded a nonexistent risk. Further, even when considering duration alone, the duration is justified when the prison officials considered the duration in light of the violent and dangerous offenses Hope was charged with. *See contra*, *Mukmuk v. Comm'r of Dep't of Corr. Servs.*, 529 F.2d 272, 276 (2d Cir. 1976).

Consequently, this Court should reason that lengthy Ad. Seg. durations alone do not violate the Eighth Amendment. However, even if this Court only considers the duration of Hope's confinement, it still does not give rise to a risk of "serious harm," in accordance with the duration of *Ruiz*, and therefore does not constitute a cruel and unusual punishment. *See* 580 U.S. 1191 (2017).

B. The Duration in Conjunction with the Conditions the Petitioner Experienced Whilst in Confinement Do Not Constitute a Risk of Serious Harm Which Gives Rise to a Cruel and Unusual Punishment Violating the Eighth Amendment.

If this Court, as it should, take the duration in conjunction with the conditions of Hope's confinement into account, it still does not constitute a risk of "serious harm " violating the Eighth Amendment. The Supreme Court has held that the length of isolation sentences should not be considered in a vacuum. *Hutto v. Finney*, 437 U.S. 678, 685 (1978). The conditions in Ad.

Seg. should not be equated to those of the G.P., as the purpose is that of a punitive “internal prison discipline.” *See Daigre v. Maggio*, 719 F.2d 1310, 1312 (5th Cir. 1983) (holding that after a prisoner cursed a prison official it was reasonable to take punitive actions such as unhygienic prison cells with “dirty and filthy” blankets and mattresses soiled by others, a limitation of mailings only to court and counsel, and a lack of ability to wash hands with soap or hot water).

Prison officials may promote important governmental interest in maintaining discipline by imposing incremental disadvantages on those already imprisoned. *Id.* at 1313; *see also Gregory v. Auger*, 768 F.2d 287, 290 (8th Cir. 1985) (holding that temporarily restricting the rights of inmates in order to deter future infractions is appropriate). Routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, and placement in segregation is part of that routine. *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008). To give rise to a conditions-of-confinement claim under the Eighth Amendment, the prisoner’s deprivations need to be “no less than of an extreme nature.” *Id.* Furthermore, under certain punitive conditions a prisoner might actually find Ad. Seg. “desirable, offering solitude and leisure as an alternative to the ordinary conditions of prison work and life,” which goes against the reasoning of Ad. Seg. *Daigre v. Maggio*, 719 F.2d at 1313.

Daily, but limited, interactions with prison staff, the possibility to communicate with other inmates, reading material, libraries, correspondence with others, and outdoor recreation could constitute social and environmental stimuli sufficient to comply with the Eighth Amendment. *See Grissom v. Roberts*, 902 F.3d 1162, 1174 (10th Cir. 2018) (holding that the petitioner who spent nearly twenty years in Ad. Seg. in several different Kansas prisons did not state a claim of cruel and unusual punishment); *see also Apodaca v. Raemisch*, 139 S. Ct. 5, 7

(2018) (holding that a lack of any outdoor exercise for over two years for prisoners in Ad. Seg. can be deemed constitutional).

In contrast, in *Porter v. Clarke*, the court held that the conditions of a Virginian death row confinement gave rise to an Eighth Amendment violation when the conditions included a limit on outdoor recreation to only one hour five times a week. 923 F.3d 348, 365 (4th Cir. 2019). Furthermore, inmates were denied access to any form of congregate recreation, such as religious, educational, or social programming, and spent between twenty-three and twenty-four hours per day in their cell. *Id.* at 354. The court also stressed that the Virginia death row cells were not adjacent to each other and caused an “absolute barrier to communication” and isolation to the inmates, which further restricted the form of Ad. Seg. and the risk to the inmate's health or safety. *Id.* at 360; *see also Anderson v. Cty. of Kern*, 45 F.3d 1310, 1315-16 (9th Cir. 1995) (holding that placing mentally disturbed or suicidal prisoners in Ad. Seg. for up to twenty-three hours a day was not an Eighth Amendment violation, as it was within the terms of confinement ordinarily contemplated by a sentence).

Here, Hope erroneously alleges that the nature of his confinement constitutes a risk of serious harm, for which the defendants subjectively drew the inference existed.

First, similarly to *Daigre*, the hygienic state of Hope's prison cell is not sufficient to constitute a cruel and unusual punishment. *See* 719 F.2d 1310, 1312 (5th Cir. 1983); J.A. 32, 37. Although Hope has raised some hygienic concerns, such as dirty walls and floor, they are not cruel or inhumane but are instead similar to what the court of *Daigre* describes as “dirty and filthy,” but not a constitutional violation, especially given the punitive interest and the fact that Hope was merely temporarily housed in the cell and later moved. *See* 719 F.2d at 1312; J.A. 35-37. Although Hope was denied cleaning supplies, this is similar to the petitioner in *Daigre*, who

lacked the ability to wash hands with soap or hot water which was not found to be cruel and unusual. *See* 719 F.2d at 1312; J.A. 36-37. Additionally, some of Hope's complaints, such as the showers not being cleaned, were merely temporary experienced during the administrative process of a necessary lockdown, and not during the full course of his Ad. Seg. J.A. 35. Further, although Hope was limited in correspondence during Ad. Seg. after having his typewriter taken, which he used to file grievances and write letters to officials, those conditions do not rise to a level of a risk of serious harm, similar to the petitioner in *Daigre*, who rightfully was deprived of mailings besides those of to court and counsel. *See* 719 F.2d at 1313; J.A. 35, 43.

Second, similarly to the lengthy duration and frequent change of prison cells constitutionally sufficient in *Grissom*, Hope also spent around two decades in Ad. Seg., and also had to change cells frequently. *See* 902 F.3d 1162, 1174 (10th Cir. 2018); J.A. 30. In fact, contrary to *Grimsson*, Hope had the benefit of changing cells within the same prison, and not having to move between different prisons. *See* 902 F.3d 1162, 1174 (10th Cir. 2018); J.A. 30. Furthermore, Hope was also offered similar social and environmental stimuli as in *Grissom*, through Hope's regular access to the prison library and reading material, interaction with prison staff, some communication by being in hearing range with other prisoners. *See* 902 F.3d at 1174; J.A. 32-35. Moreover, unlike the complete, but still constitutional, lack of outdoor exercise in *Apodaca*, Hope had regular weekly access to outdoor recreation stimuli, as much as five times a week for two hours a day. *See* 139 S. Ct. at 7; J.A. 32-33. Hope's complaint further lacks merits given the fact that Hope seems to only chose to use half of his allotted time outdoors. J.A. 32-33. This social and environmental stimulus highlights that Hope was not deprived to an extent which gave rise to a risk of serious harm, violating the Eighth Amendment.

Third, unlike the cruel and unusual punishment in *Porter*, Hope was allowed double the amount of recreational time outdoors and did not have to spend as much time within his cell compared to the inmates in *Porter*, who nearly spent twenty-four hours a day in their cells. *See* 923 F.3d at 360, 365; J.A. 33. Furthermore, Hope was housed in a private cell that was close enough to other inmates to hear and communicate with each other, which lessens the degree of isolation, unlike the cells in *Porter*, which were isolated far apart in an “absolute barrier to communication.” *See* 923 F.3d at 360; J.A. 33. Further, unlike the unconstitutional deprivation of stimuli in *Porter*, Hope was afforded educational and mental stimuli, through Hope’s regular access to the prison library, with an ability to order several books as often as three times a week. *See* 923 F.3d at 360; J.A. 35.

Fourth, Hope’s duration of twenty-two to twenty-three hours in Ad. Seg. is within, or even less than, the terms of confinement ordinarily contemplated by a sentence, such as the terms in *Anderson*. *See* 45 F.3d at 1315; J.A. 31. In other words, Hope has not shown that he has an issue of liberty interest compared to remaining in the G.P. of the prison. As his claims of mental health issues are minimal compared to the medical needs of the mentally disturbed or suicidal prisoners in *Anderson*, there is even less of an issue of a constitutional violation for Hope who was also granted medical and mental treatment from the prisoner’s health personnel. *See* 45 F.3d at 1316; J.A. 37.

Thus, Hope’s allegations from his conditions, such as his purported illness from meals, being handcuffed, and forced to squat when receiving meals, do not constitute a risk of serious harm, constituting a cruel and unusual punishment. J.A. 32. Instead, throughout his time in Ad. Seg., Hope was provided a “minimal civilized measure of life's necessities,” as Hope was provided both physical and mental health services by health practitioners. J.A. 37. Hope also

received physical and mental stimuli, such as leaving his cell four times a day to participate in recreational activities and to shower, and visit the law library several times a week. J.A. 32, 35, 37. Therefore, Hope's allegations have little support to his conditions being abnormal to other prison conditions and rights, either by comparison of other G.P. and the nature of other Ad. Seg. *See Grissom v. Roberts*, 902 F.3d 1162, 1174 (10th Cir. 2018); *see also Apodaca v. Raemisch*, 139 S. Ct. 5, 7 (2018); *see also Anderson v. Cty. of Kern*, 45 F.3d 1310, 1315-16 (9th Cir. 1995). As Hope's situation does not constitute a level of harm which is below the prison standard which would support a deliberate indifference from the prison officials, it therefore fails to show a cruel and unusual punishment by proving a departure from the conditions of his confinement to comparable prison confinements. Hope was not exposed to a risk of serious harm which was so obvious that the prison officials "must have been" aware of it, especially given that the duration alone, nor the circumstances, are not abnormal to other inmates.

In conclusion, Hope has not fulfilled the first objective to prove a "sufficiently serious" threat to his health, as the prison conditions provide a "minimal civilized measure of life's necessities" for Hope, while being part of the penalty for Hope's long history of crimes. Furthermore, Hope has also not fulfilled the three requirements to prove "deliberate indifference." Specifically, the first prong is not fulfilled as Hope has not shown that the defendants were aware that a risk of serious harm existed. Thus, Hope's duration of confinement in conjunction with the conditions do not constitute a risk of serious harm which gives rise to an Eighth Amendment violation.

C. Petitioner Failed to State a Claim of Cruel and Unusual Punishment, as the Penological and Public Interest Outweighs any Individual Rights.

Hope's duration and conditions in Ad. Seg. are outweighed by the penological and public interest of Texas. The decision of where to house inmates is at the core of prison administrators'

expertise. *McKune v. Lile*, 536 U.S. 24, 29 (2002). Ad. Seg. is not an uncommon placement for prisoners, with a reported twenty percent of federal and state prisoners having spent time in Ad. Seg. See Alexander A. Reinert, *Solitary Troubles*, 93 Notre Dame L. Rev. 927, 928 (2018). Courts have held that some inmates' experience in Ad. Seg. is not materially different than other cases without a lack of liberty interest. See *Ballinger v. Cedar Cty.*, 810 F.3d 557 (8th Cir. 2016) (holding that one year in Ad. Seg. was not in itself an "atypical and significant hardship").

Prison officials may use prolonged solitary detention to serve some other legitimate penological objective whilst handling the difficult task of operating a detention center. *Id.* This difficult task may not be underestimated by the courts. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326 (2012). The State's penological interest is "substantial and legitimate" and is in serving "deterrence, retribution, and rehabilitation." *Williams v. Illinois*, 399 U.S. 235, 264 (1970). This Court has "long held that prison regulations that impinge on the constitutional rights inmates would enjoy outside of prison" are valid when they "reasonably related to legitimate penological interests in managing the prison" *United States v. Haymond*, 139 S. Ct. 2369, 2383 (2019). This restriction on constitutional rights is adopted in order to ensure that prison officials can "anticipate security problems" and address "the intractable problems of prison administration." *Id.* Prolonged solitary detention of an inmate may reasonably be deemed necessary to protect the well-being of prison employees, inmates, and the public. *Porter v. Clarke*, 923 F.3d 348, 363 (4th Cir. 2019); see also *Davidson v. Cannon*, 474 U.S. 344, 356 (1986) (holding that one of the State's primary missions in running a prison is "the maintenance of internal security"). Although conditions in Ad. Seg. could be less desirable than the G.P., it is important to keep the bigger policy picture of protection and punitive reasons together with the

reason for the prisoner for being imprisoned in the first place in mind. *See Davidson v. Cannon*, 474 U.S. at 355 n.5 (holding that prison conditions are “typically part of the State's legitimate restraint of liberty as a function of punishing convicted persons”); *see also Davis v. Ayala*, 576 U.S. 257, 290 (2015) (where Justice Thomas, in his concurrence, responds to Justice Kennedy’s concern of harm from Ad. Seg. by stressing that the accommodations of the prisoner’s housing are “a far sight more spacious than those in which his victims . . . now rest.”).

For example, in *Bell v. Wolfish*, the Court held that an imposed restriction in prison confinement was not cruel and unusual, if it reasonably related to a “legitimate governmental interest” without being merely punitive, but it need not necessarily be compelled by “necessities of jail administration.” 441 U.S. 520, 540 (1979). Other deprivations besides purely punitive include administrative and deterrence. *Id.* Furthermore, Justice Marshall takes the analysis one step further by suggesting that the inquiry should not merely be whether the prison restrain can be labeled “punishment,” but rather whether “the governmental interests served by any given restriction outweigh the individual deprivations suffered.” *Id.* at 564 (Marshall, J., dissenting).

Here, although Hope does experience undesirable conditions, they should not be scrutinized in a vacuum without also taking into account the harm he has inflicted on the public through his many violent offenses. J.A. 28. Similar to Ruiz, Hope has a violent past which must be taken into account when considering the safety of the other inmates; on several occasions, Hope has used deadly weapons during aggravated robberies against the public. *See Ruiz v. Texas*, 580 U.S. 1191; J.A. 28, 56. Hope was deemed an “escape risk” because he posed a danger to the public. J.A. 28, 42. Hope has escaped twice, in 1990 and 1994. J.A. 28, 57. During his second escape on November 26, 1994, he stole a car at knifepoint, cut an 83-year-old driver of the car, and deserted him on the side of the road, and proceeded to go on a

“crime spree of armed robberies” for two months. J.A. 57. As if that was not enough, Hope has also been accused of having a razor in his cell which further highlights the need for safety precautions. J.A. 36. It is therefore evident that there is a heightened interest in protecting the public from Hope trying to escape a third time, as well as a penological interest in punishing and deterring Hope from committing further crimes. Further, the individual interest of a prisoner with a violent past is low, similar to the argument of Supreme Court Justice Thomas in *Davis*, and the complaints of lengthy durations or less than desirable conditions of confinement are therefore weakened when the inmate has a violent past. *See generally* 576 U.S. 257, 290 (2015).

Furthermore, Hope did not assert any evidence to support his statements that he is not a safety risk sufficient to justify the prison warden’s decision to prioritize Hope’s individual concerns over those of the G.P. and the public. J.A. 42. The important task of safety, security, and order of the prison must be prioritized, and Hope’s time and the nature of the conditions in Ad. Seg. are “reasonably related to legitimate penological interests in managing the prison” and the “intractable problems” which come with it, as the prison officials must “anticipate [further] security problems” caused by Hope. *See United States v. Haymond*, 139 S. Ct. at 238; J.A. 28. Thus, the confinement of Hope serves a “legitimate governmental interest,” which is not purely punitive, but also serves an interest in effective prison administration, and protection of the public through deterrence. *See Bell v. Wolfish*, 441 U.S. at 540.

Lastly, Hope’s numerous, conclusory allegations to the Court, and the ridiculous nature of some of them, such as being served “Johnny” peanut butter sandwiches, or complaining about not being served “condiments like mustard and syrup,” harms his credibility and lowers the plausibility of his allegations. *See Keith v. Dekalb Cty.*, 749 F.3d 1034, 1045 n.39 (11th Cir. 2014) (holding that a prisoner challenging his conditions of confinement with successive counts

of allegations with vague or immaterial basis constituted a condemned “‘shotgun’ pleading” which unnecessarily taxed the time and resources of the court); J.A. 32, 35. Hope also complains of back pain, even though he is in his fifties and is freely choosing to sleep on the floor instead of his provided mattress. J.A. 30, 37. No prison facility could possibly address all of Hope’s concerns in running a functioning prison, and prioritize his individual rights over those of their peers, the public, and other inmates, and it is ultimately the prison officials who have the best expertise in balancing these interests while running a safe prison facility. *See generally Davidson v. Cannon*, 474 U.S. 344, 355 n.5 (1986).

The great interest of the state of Texas in protecting the public, prison staff, and other prisoners far outweighs Hope’s individual liberty interest. *See Hewitt v. Helms*, 459 U.S. 460, 473 (1983). Although Hope has been in Ad. Seg. for twenty-seven years, it is justified when taking his escape risk, history of violent behavior, and the great interest in protecting the public into account. J.A. 31. The prison officials’ duty to the public, and the important task they are faced with of protecting other inmates and the public, further highlights and outweighs that the measures taken were necessary, and not abnormal to the point of being “obvious” or a “deliberate indifference.”

Therefore, Hope’s confinement is not merely punitive but serves a “legitimate governmental interest” by offering “deterrence, retribution, and rehabilitation” in order to protect the public. *See Bell v. Wolfish*, 441 U.S. at 540; *see also Williams v. Illinois*, 399 U.S. at 264. In fact, due to his violent history and capability of escaping, Hope’s confinement is so justified that “the governmental interests served by any given restriction outweigh the individual deprivations suffered.” *See Bell v. Wolfish*, 441 U.S. at 564 (Marshall, J., dissenting). As the penological and

public interests outweigh the individual rights of Hope, his housing in Ad. Seg. is justified and this Court should dismiss Hope's Eighth Amendment claims.

II. PETITIONER FAILED TO STATE A PROCEDURAL DUE PROCESS CLAIM UNDER THE FOURTEENTH AMENDMENT BECAUSE THE STATE'S INTEREST IN SAFETY IS DOMINANT AND PETITIONER IS PROVIDED CONSTITUTIONALLY SUFFICIENT PROCESS.

The Fifth Circuit properly affirmed the dismissal of Petitioner's procedural due process claim under the Fourteenth Amendment because, while Hope has a valid liberty interest at stake, the state's interest outweighs that of Hope and the process he is provided satisfies the constitutional requirements of the Fourteenth Amendment. The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law," and protects the individual "against arbitrary action of the government." U.S. Const. amend. XIV, § 1; *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Those who seek to invoke the procedural protections of the Due Process Clause must satisfy a two-question inquiry: first, the threshold question of whether the individual has either a liberty or property interest that has been interfered with by the government; and second, whether the procedures in place to guard against that deprivation are constitutionally sufficient. *Kentucky Dep't of Corr., v. Thompson*, 490 U.S. 454, 460 (1989); *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

A. Petitioner Established a Liberty Interest Under the Due Process Clause with Which the State Is Interfering.

This Court should uphold the Fifth Circuit's decision that Hope established a liberty interest that the state is interfering with because his Ad. Seg. placement is effectively indefinite, and his placement disqualifies him from parole. The threshold question in assessing a procedural due process claim is whether an individual has a liberty or property interest that has been

interfered with by the state. *Kentucky Dep't of Corr.*, 490 U.S. at 460. A liberty interest can arise from the Constitution by reason of promises inherent in the word “liberty,” or it can arise from an expectation or interest created by state policies or laws. *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980); *Wolff v. McDonnell*, 418 U.S. at 556-58. In the case of a state-created liberty interest, the conditions, and the nature of the deprivation, not the language of the state policy or law itself, guide a due process inquiry. *Wilkinson*, 545 U.S. at 223. A person sentenced to state prison does not have a liberty interest inherent in the Constitution in avoiding transfer to a less favorable confinement. *Wilkinson*, 545 U.S. at 221. Nonetheless, they maintain a liberty interest in avoiding certain conditions of confinement that may arise from state policies or laws. *Id.* Neither state policies nor laws create the basis for a liberty interest in the conditions of confinement if such conditions, in relation to the ordinary occurrences of prison life, do not inflict “atypical and significant hardship on the inmate.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995). An inmate’s due process interest is largely limited to freedom from restraint which “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,” and Ad. Seg. placement is not grounds for a due process claim unless it imposes such a hardship. *Id.* (citations omitted).

An inmate may have a liberty interest in avoiding placement in a more restrictive form of confinement. *Wilkinson v. Austin*, 545 U.S. 209, 222 (2005). The Supreme Court in *Wilkinson v. Austin* affirmed the district court’s holding that the inmate had a protected liberty interest in avoiding “Supermax placement” because it imposed an “atypical and significant hardship” on an inmate in relation to the ordinary incidents of prison life. 545 U.S. at 224. There, the Supermax conditions were restrictive, with twenty-three hour per day confinement, constant lighting, limited exercise time, and visitation opportunities. *Id.* at 214. The Court determined that these

conditions likely equate to most Ad. Seg. facilities, if not for the two additional components: (1) duration, and (2) disqualification from parole. *Id.* at 224. Placement in Supermax is indefinite, reviewed annually, and disqualifies an otherwise eligible inmate for parole considerations and therefore, the conditions imposed an atypical and significant hardship such that an inmate has a liberty interest in avoiding placement in Supermax. *Id.*

The Fifth Circuit held that the inmate in *Wilkerson v. Goodwin* had a Fourteenth Amendment liberty interest in avoiding a prolonged thirty-nine-year placement in Ad. Seg. because, in relation to the ordinary incidents of prison life, the duration constituted an atypical and significant hardship. 774 F.3d 845, 848 (5th Cir. 2014). Ad. Seg. placement is not grounds for a due process claim unless it imposes an atypical and significant hardship. *Id.* at 853. The court contemplated the duration of the inmate's Ad. Seg. placement, the severity of the restrictions, and their effectively indefinite nature. *Id.* at 855. Nearly thirty-nine-years in Ad. Seg. was found extraordinarily sufficient and effectively indefinite to give rise to a liberty interest because it is almost five times the duration deemed sufficient to give rise to a liberty interest. *Id.* at 855. Compared with inmates in the G.P., the court held that the inmate's twenty-three hour per day confinement with one hour for exercise and a shower and disqualification from religious or educational opportunities was sufficiently severe. *Id.* at 856. Ordinary incidents of prison life are ordinary when experienced by a measurable proportion of a prison's baseline population. *Id.* at 856. The court was unable to identify another inmate in the state of Louisiana who was held in Ad. Seg. for equally as long, leading the court to hold that the inmate's effectively indefinite placement and severe restrictions posed an atypical and significant hardship and could not be classified as "ordinary" by any measure. *Id.* at 856.

Here, Hope's placement in Ad. Seg. is sufficient to establish a liberty interest with which the state is interfering. Hope's twenty-three-year Ad. Seg. placement, while less than the thirty-nine-years in *Wilkerson*, is an extraordinary duration and effectively indefinite. *Wilkerson*, 774 F.3d at 855. The conditions of his confinement are sufficiently severe like in *Wilkinson* and *Wilkerson*: twenty-three-hour per day confinement, limited time to exercise and shower, and disqualification from religious and vocational opportunities. J.A. 32-33; *Wilkinson*, 545 U.S. 209; *Wilkerson*, 774 F.3d 845. Like in *Wilkinson*, Hope's placement disqualifies him from parole, a condition this Court considers to be "atypical and significant hardship." J.A. 31, 42; *Wilkinson*, 545 U.S. 213. Under *Wilkerson* and *Wilkinson*, the Fifth Circuit correctly held that Hope's confinement gives rise to a liberty interest, and this Court should affirm on this issue. *Wilkinson*, 545 U.S. at 209; *Wilkerson*, 774 F.3d at 845.

B. The Procedures Associated With Petitioner's Liberty Deprivation Were Constitutionally Sufficient.

This Court should uphold the Fifth Circuit's decision affirming the dismissal of Hope's Fourteenth Amendment claim because the process he is provided satisfies the constitutional requirements of the Fourteenth Amendment under the three-factor balancing framework established by this Court in *Mathews v. Eldridge*. 424 U.S. 319 (1976).

In examining a Due Process claim, once the threshold question has been satisfied, the Supreme Court considers "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corr.*, 490 U.S. 454, 460 (1989). Declining to institute rigid rules to guide the assessment of this question, the Supreme Court concluded that due process is flexible and necessitates particularized procedural protections as the circumstances demand. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 15 (1979). This Court articulated a three-

factor balancing framework to evaluate the sufficiency of procedures associated with the deprivation of a liberty or property interest. *Mathews*, 424 U.S. at 335.

The Fifth Circuit applied the *Mathews* framework and correctly held that while Hope has a limited private liberty interest, there are no procedural deficiencies in his state classification hearings because he is provided with notice, a fair opportunity for rebuttal, and an opportunity to submit objections to the classification determinations. *Id.* Further, the state's fundamental interest in ensuring the security and safety of the prison officials, inmates, and the public outweighs Hope's private liberty interest. Under the *Mathews* framework established by this Court, Hope is provided with a constitutionally sufficient process. *Id.*

i. Petitioner has a Private, Albeit Minimal, Liberty Interest.

The *Mathews* framework first considers the significance of the private interest that will be affected by the official state action. *Mathews*, 424 U.S. at 335. A lawfully confined inmate's liberty has been curtailed by the nature of their incarceration. *Wilkinson*, 545 U.S. at 225. It follows, in comparison to a person whose liberty interest at stake is freedom from confinement, the procedural protections an inmate is entitled are more limited and must be evaluated within the context of the prison system. *Id.*

For example, in *Wilkinson*, the Court considered the inmate's private liberty interest in avoiding mistaken placement in a Supermax prison. 545 U.S. 209. While the inmate's private liberty interest at risk was less than that of a non-incarcerated person, the Court held that the inmate nonetheless had a liberty interest that must be evaluated within the context of the prison system and its associated curtailment of individual liberties. *Id.* at 225. Similarly, in *Hewitt v. Helms*, the inmate's private liberty interest was deemed insignificant because he was moved from one extremely restrictive confinement to another even more restrictive confinement while

awaiting a scheduled disciplinary hearing. 459 U.S. 460 (1983). The Second and Third Circuits have concluded that an inmate who has spent an extended period in Ad. Seg. and whose placement is essentially indefinite has a more significant liberty interest than in *Hewitt*. 459 U.S. 460; see *Proctor v. LeClaire*, 846 F.3d 597, 610 (2d Cir. 2017) (holding that an inmate held in Ad. Seg. for thirteen years with no scheduled release date has a private liberty interest); see also *Mims v. Shapp*, 744 F.2d 946, 951-52 (3d Cir. 1984) (holding that an inmate who has been in Ad. Seg. for five years has a private liberty interest).

Evaluating Hope's private liberty interest within the context of the prison system and its associated curtailment of liberties, the Fifth Circuit correctly concluded that Hope has a significant private liberty interest that is "more than minimal." *Hope*, 861 Fed. Appx. at 580. Like in *Wilkinson*, Hope's private interest is limited, because of his incarceration, to the right to remain in the G.P. rather than in Ad. Seg. 545 U.S. at 225. Hope asserts that he is deprived of liberty beyond what is common to prison life in the G.P., citing smaller meal portions, increased frequency of strip searches, less commissary, and restrictions on participation in group recreational programs. J.A. 32-33. Compared to prison life in the G.P., Hope's private liberties are further curtailed by of his placement in Ad. Seg., like those in *Proctor*, *Mims*, and *Hewitt* such that he has asserted a private liberty interest. *Id.*; *Hewitt*, 459 U.S. 460; *Proctor*, 846 F.3d 610; *Mims*, 744 F.2d 946.

Hope alleges that his Ad. Seg. placement is effectively indefinite, ensuring the continued deprivation of his private liberties beyond what is common to prison life in the G.P. J.A. 41. Duration in Ad. Seg. was dispositive for the Second and Third Circuits in *Proctor* and *Mims*, both holding that inmate possessed a more significant private liberty interest for due process analysis than that attributed to the inmate in *Hewitt*. *Proctor*, 846 F.3d at 610; *Mims*, 744 F.2d at

952. Hope's twenty-three-year placement, nearly twice the amount of time compared to *Proctor* and four times of that in *Mims*, is effectively indefinite such that he has established a private liberty interest at for due process analysis. J.A. 31. Considering his private liberty interest within the context of the prison system and related curtailment of liberties, the Fifth Circuit correctly held that Hope has a private liberty interest that is "more than minimal." *Hope*, 861 Fed. Appx. at 571.

2. Petitioner Does Not Plead Any Procedural Deficiencies in His State Classification Committee Hearings and Petitioner Is Provided With Notice, a Fair Opportunity For Rebuttal, and an Opportunity to Submit Objections.

The second *Mathews* factor considers both the risk of incorrect placement under the established procedures and the probable value, if any, of additional or alternative procedural safeguards. *Wilkinson v. Austin*, 545 U.S. 209, 225. Notice and a fair opportunity for rebuttal by written or oral statement are among the most critical procedural mechanisms available to avoid risk of erroneous placement. *Id.* at 226. A fair opportunity for rebuttal must be granted within meaningful time and in a meaningful manner and an individual must be permitted to present their own arguments and evidence verbally or in writing. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970); *see also Greenholtz*, 442 U.S. 1 (holding that presenting statements on one's own behalf before a parole board suffices as an effective opportunity for rebuttal and adequately safeguards against serious risk of error).

Wilkinson defines the notice, rebuttal, and participation due process requirements. 545 U.S. 209. There, the inmates argued that the Supermax prison placement policy was unconstitutional because the procedures were inconsistent and undefined. *Id.* at 215. The Court held that sufficient process was afforded because the inmates had notice of the factual basis for their Supermax placement, a fair opportunity for rebuttal by attending the hearing, an

opportunity to submit objections before the final level of review, and review within thirty days of inmate's placement. *Id.* at 216-17, 225-27. The Court held that the likelihood of erroneous placement further decreases when the state provides an inmate with the opportunity to "submit objections prior to the final level of review" and a placement review within thirty days of their initial placement. *Id.* at 226-27. The state's placement policy satisfied due process because it afforded inmates with the most critical procedural mechanisms available to avoid erroneous placement. *Id.*

Beyond notice of the charges against him and an opportunity to rebut those charges in writing or verbally, prison officials are only required to conduct an informal, non-adversarial evidentiary review to consider if the inmate's confinement is justified. *Hewitt*, 459 U.S. at 476. The *Hewitt* Court concluded that prison officials have wide latitude in the procedures they implement and that Ad. Seg. placement is appropriate when an inmate poses a security threat or when prison officials need to investigate an inmate's misconduct charges. *Id.* at 474-76. There, prison officials determined the inmate was a security threat because he assaulted a prison official which led to a prison riot. *Id.* at 462-63. To ensure that the state's interest justifying an inmate's liberty deprivation has not grown stale and that prison officials are not using Ad. Seg. as "a pretext for indefinite confinement of an inmate," *Hewitt* requires prison officials conduct periodic placement reviews to verify that the inmate remains a security risk throughout their term in Ad. Seg. *Id.* at 477 n.9. Prison officials must look to the inmate's present and future behavior and status, in addition to previous events, to ensure past events alone do not justify Ad. Seg. placement. *Id.* at 474-76. However, prison officials are not barred from giving significant weight to previous events and final Ad. Seg. determinations can be justified by "purely subjective evaluations and on predictions of [an inmate's] future behavior." *Id.* at 474.

Periodic placement reviews can evaluate the inmate's prior violent behavior or otherwise relevant conduct. *Mims*, 744 F.2d 953. For example, while serving a sentence for first-degree murder of a police officer, the inmate in *Mims* was placed in Ad. Seg. because of his participation in the murder of two prison employees. *Id.* at 948. During his placement in Ad. Seg., the prisons review committee conducted monthly reviews of his status and consistently recommended to the Prison Warden that he remain in Ad. Seg. *Id.* at 949. Both the Prison Warden and Corrections Commissioner testified that the decision to keep the inmate in Ad. Seg. was due to his past criminality, dangerous behavior, and the consensus amongst the prison staff that the inmate was "extremely dangerous." *Id.* at 952. Applying *Hewitt*, the court concluded that due process permits the review committee to consider prison officials' subjective evaluations of an inmate, predictions of future behavior, and past criminality. *Id.* at 953. The court held that the inmate's periodic reviews comported with the minimum constitutional standards. *Id.* at 954.

Here, Hope alleges procedural deficiencies in his placement reviews without any evidence. J.A. 38-39, 41. He simply contends that the ASC and SCC reviews are a "sham" because the committee does not hear new evidence, will not allow him to call a witness, and base their decision on his prison escape. *Id.* Without evidence, he relies on individual SCC members' statements that he could be moved to contend that the committee failed to use fair review procedures. J.A. 39. Hope's contention is incorrect as the periodic ASC and SCC review procedures comport with the constitutional requirements of due process. J.A. 38. He is provided with the two most critical procedural mechanisms available to avoid risk of erroneous placement, notice of the factual basis of his placement in Ad. Seg. and a fair opportunity for rebuttal by attendance at the hearings and chance to make written or oral statements. *Wilkinson*, 545 U.S. at 225-26; J.A. 38-41.

Hope acknowledges he has notice of the factual basis of his Ad. Seg. placement, namely his 1994 prison escape. J.A. 41. Like the inmates in *Hewitt* and *Mims* who were considered security threats, Hope's dangerous and violent behavior, and prison escape led prison officials to classify him as a security threat and place him in Ad. Seg. J.A. 41; *see Hewitt*, 459 U.S. 460; *see Mims*, 744 F.2d 946. While his designation as an "escape risk" was removed in December 2005 by the Security Precautions Designator committee, Hope admits that the initial reason for his Ad. Seg. placement remains a reason for his continued placement. J.A. 42. This Court has held that in a review of an inmate's placement, prison officials must consider the inmate's present and future behavior in addition to past events and are not barred from giving significant weight to past events. *Hewitt*, 459 U.S. at 477 n.9. Hope asserts that the SCC does not consider his current attitude or behavior in his review, yet also admits that the SCC has considered the removal of his "escape risk" designation in his April 2007 and January 2010 reviews. J.A. 38, 42. Because prison officials have wide latitude in the procedures they implement, the review Hope is afforded satisfy the minimum constitutional standards. *Hewitt*, 459 U.S. at 474-76.

Additionally, Hope concedes that he has been provided with the opportunity for rebuttal. J.A. 39. He states that he has attended over forty-eight SCC reviews conducted every 180 days where he was permitted to make oral and written requests to be released to the G.P. J.A. 38-39. Consistent with this Court's precedent, including in *Hewitt* and *Wilkinson*, a fair opportunity for rebuttal by either written or oral statements is a critical procedural mechanism to prevent erroneous placement. *See Hewitt*, 459 U.S. 209; *see Wilkinson*, 459 U.S. 460. Hope states he has been provided with this constitutionally mandated procedural mechanism. J.A. 39-41. Further, Hope is provided with an opportunity to submit objections to the SCC decision before the final level of review by filing a grievance with the unit warden. J.A. 43. This Court considers this

additional procedural mechanism to further decrease the chances of erroneous placement. *See Wilkinson*, 545 U.S. at 226. Hope is provided with the two most critical procedural mechanisms, notice and opportunity for rebuttal by written or oral statements, and he is afforded the additional safeguard of the opportunity to object to the SCC decision. J.A. 38-39, 43.

Hope has met the second *Mathews* factor and the Fifth Circuit correctly held that the procedural protections Hope is afforded decrease the risk of erroneous placement and are constitutionally sufficient. 424 U.S. at 335.

3. Respondent's Interests Outweigh that of Petitioner.

The final factor of the *Mathews* balancing framework addresses the state's interest which includes, "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* In procedural due process claims that concern prison management, like the present claim, the state's interest is "a dominant consideration." *Wilkinson*, 545 U.S. at 227. This Court has articulated that the state's primary obligation and "most fundamental responsibility," is "to ensure the security and safety of guards and prison personnel, the public, and the prisoners themselves." *Hewitt*, 459 U.S. at 473; *Wilkinson*, 545 U.S. at 227. The problem of scarce resources is another important component of the state's interest. *Wilkinson*, 545 U.S. at 228. Before "mandating additional expenditures for elaborate procedural safeguards," the Court must give substantial deference to prison management decisions when a correctional official determines an inmate has engaged in dangerous behavior. *Wilkinson*, 545 U.S. at 228.

The *Wilkinson* Court found that the state's primary obligation is to ensure prison security, the safety of prison guards and personnel, the public, and nearly 44,000 inmates. 545 U.S. at 227. The scarce resources available to the prison and the high cost of incarceration makes it

difficult to fund education and vocational programs, let alone implement additional procedural attributes to the placement hearings. *Id.* at 228. The state's fundamental responsibility of safety, immediate objective of controlling inmates, and greater objective of controlling the prison would be defeated if the additional or substitute procedural requirements were implemented. *Id.*

Similarly, the Third Circuit in *Mims* determined a state's internal security threat posed by an inmate's murder of two prison officials was compelling and the prison officials formulated reasoned responses by means of Ad. Seg. placement. 744 F.2d at 952. The court reasoned that prison officials should be accorded a high level of judicial deference in the adoption and execution of policies and practices that in their judgment are required to maintain internal order, discipline, and institutional prison security. *Id.* at 950. Given the serious security threat the inmate posed, the court held that the prison official's response was only proper. *Id.* at 953.

Here, the state's primary interest is institutional prison security by keeping the public, prison personnel, and the other inmates safe. *See Hewitt*, 459 U.S. at 473; *see Wilkinson*, 545 U.S. at 227. Hope's previous violent prison escapes weigh heavily in favor of the state concluding that Hope is an institutional security threat and should be confined in Ad. Seg. J.A. 28. Following Hope's second escape from the Texas state prison in November 1994, he stole a car at knife point, severely cut the 83-year-old driver of the car, abandoned the driver on the side of the road, and then proceeded to commit a series of armed robberies until his arrest two months later. J.A. 57; *see United States v. Hope*, 102 F.3d 114, 115 (5th Cir. 1996). Like the inmate in *Mims*, Hope's placement in Ad. Seg. was punishment for his violent prison escape that jeopardized the safety and security of the prison, prison officials, other inmates, and the public. J.A. 57; *see Mims*, 744 F.2d 946; *see Hope*, 102 F.3d at 114. The Fifth Circuit correctly held that the state's interest in safety and security justified Hope's continued confinement in Ad. Seg.

CONCLUSION

This Court should affirm the dismissal of Petitioner's Eighth Amendment and Fourteenth Amendment claims. Petitioner's claim does not give rise to an Eighth Amendment prohibition of cruel and unusual punishment, neither by considering: (1) the duration of confinement alone; nor (2) the conditions of confinement. While Hope has established a private liberty interest that the state is interfering with, the state's interest and the provided process, including notice, fair opportunity for rebuttal, and opportunity to submit objections prior to the final level of review, Petitioner is provided constitutionally sufficient process under the Fourteenth Amendment. *Kentucky Dep't of Corr*, 490 U.S. 454; *see also Mathews*, 424 U.S. 334. For the foregoing reasons, the Respondents respectfully request that this Court *affirm* the Fifth Circuit's dismissal of Petitioner's Eighth and Fourteenth Amendment claims.

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Respectfully Submitted,

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